SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 3[illegible]

TWIN CITY MINING & SMELTING COMPANY,

vs.

CHILIAN MINING COMPANY, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF [illegible]

STATEMENT OF THE FACTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY,
Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION, ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION

In accordance with Rule 12 of the Rules of this Court, the above named appellant filed the following statement disclosing the basis upon which is contended that this Court has jurisdiction upon appeal to review the final order or final judgment of the State Supreme Court appealed from herein.

Basis Upon Which This Court Has Jurisdiction

The Supreme Court of the State of Washington, the highest Court of said State, refused to give the appellant the benefits of the provisions of Section 3803-31, paragraph I of Remington's Revised Statutes (Sup.), of the Uniform Business Corporation Act of the State of Washington,

of 1933, which went into full force and effect on January 1, 1934, which provided:

> "A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And the provisions of the By-Laws of the Appellant, which provides:

> Trustees: "Shall hold office for one year and until their successors are elected and qualified."

And thereby denied the *"Stockholders of the Twisp Mining & Smelting Company"* their constitutional right to have a vote of the majority of the Board of Seven Trustees, before all the assets of the Twisp Mining & Smelting Company could be legally sold, and by so doing has denied these Stockholders the equal protection of the laws of the State of Washington and in so doing has unlawfully sanctioned the confiscation of the property and property rights of the Stockholders of the Twisp Mining & Smelting Company without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In this instant case, the Receiver, and the Chelan Mining Company and the Methow Gold Corporation, by their respective Counsels and with the knowledge and acquiescence of said corporations that said "Quit Claim Deed" of date of January 31, 1934, Exhibit 20, was a "Forged Deed" within the meaning of Section 2586 of Remington's Re-

vised Statutes of the State of Washington, for the reason that John C. Sawbridge, who purported to execute same, was not the President of the Twisp Company and for the further reason that James O. Cull, who purported to execute same, was not the Assistant Secretary of the Twisp Company and neither of them were ever legally authorized to execute such a Deed by the Board of Trustees of the Twisp Company, as later will appear in this proceeding; and knowing that as a matter of law no right, title or interest or right of possession passed to the Receiver of the Chelan Mining Company or the Methow Gold Corporation by virtue of said "Forged Quit Claim Deed," deliberately and intentionally planned and carefully executed a scheme to defraud the Twisp Mining & Smelting Company and the State Supreme Court by falsely claiming to the State Supreme Court that the question of the "Forged Deed" was never raised in the trial Court, well knowing that said statements were false and untrue, and by reason of those false statements said Counsels unlawfully induced the State Supreme Court to refuse to pass on the question of the "Forged Deed" and said Receiver, the Chelan Mining Company and the Methow Gold Corporation, obtained a fraudulent begotten affirmance of the judgment of the Superior Court of Okanogan County, State of Washington, which cannot be allowed to stand under the decision of this United States Supreme Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 Law Ed. Advance Opinion 936, where that Court, among other things, said:

> "Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulent begotten judgments."

Statutory Provisions Sustaining Jurisdiction

The Act of February 13, 1925, Chapter 229, 43 Stat. 936, effective May 13, 1925 (United States Judicial Code,

Title 28, Section 344), provides that Section 237 (a) of the Judicial Code is amended to read as follows:

> "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where there is drawn in question * * * the validity of a statute of any State, on the grounds of its being repugnant to the Constitution, Treaties or Laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

Also, the Act of January 31, 1928, Chapter 14, 45 Stat. 54, provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress, that writs of error in causes, civil and criminal, are abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Also, the Act of April 26, 1928, Chapter 440, 45 Stat. 466, amended Section 2 of the Act of January 31, 1928, to read as follows:

> "The statute regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relative to costs, supersedes, with mandate, shall be applicable to the appeals which the preceding section substituted for writ of error."

Washington Statutes Involved

The Statute of the State of Washington, Section 3803-31, Paragraph 1 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, the validity of which as construed and enforced by the State Supreme Court is attacked by appellant, as follows:

The Statute expressly provides that "Trustees" or "Directors" of Boards of Trustees of Corporations in the State of Washington shall hold office until their successors are duly elected and duly qualified, and while John B. Hottel and Chas. W. Julian resigned as Trustees on August 15, 1932, and John Goetz and Frederick C. MacDonald were elected as "Trustees" in their place and stead, their office as Trustees on the Board of Seven Trustees of the Twisp Mining & Smelting Company was not vacant and could not legally be held to be vacant until their successors were duly elected and qualified and the State Supreme Court was bound by that statutory provision and had no legal power or authority to hold otherwise.

The State Supreme Court, therefore in holding that since John Goetz and Frederick C. MacDonald, as James O. Cull contended, had failed to qualify as Trustees by failing to take their oath of office, there were two-vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934, exceeding its statutory jurisdiction, power and authority and unlawfully deprived the Stockholders of the Twisp Company of the equal protection of the Statutory Laws of the State of Washington, and unlawfully sanctioned the taking of their property and property rights without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States under the following decisions of this Court, to-wit:

In *Ranson* v. *Williams*, 2 Wall 313, 17 L. Ed. 803, this Court held:

> "The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by Courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a Court of general jurisdiction, because no authority derived by law can transcend the source from whence it came; and the principle that a limited authority must appear to have been strictly construed even when the acts of the Superior Court are in question, is well settled." Also see Murry v. American Surety Co., 70 Fed. (9th. C. C. A.) 341, holding the same views.

In *John Vallely, as trustee in Bankruptcy*, v. *Northern F. & M. Ins. Company*, 254 U. S. 348, 65 L. Ed. 297, in a well reasoned opinion on this subject, held:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal."

And, therefore, the State Supreme Court's holding above referred to was absolutely void, when entered, and ever thereafter.

Section 3803-36, Paragraph 1, of Remington's Revised Statutes (Sup.) provides:

> "A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign." and under paragraph 2, of same section it provides:

"* * * If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors."

And Article 11, Section 5 of the Twisp Mining & Smelting Company's By-Laws, provides:

"Special meetings of the Board of Trustees shall be held whenever called by the President, or by one-third of the Trustees for the time being in office. The Secretary shall give notice of each special meeting by mail, the same to be at least two days before the meeting or by telegraph at least one day before the meeting, to each Trustee; but, such notice may be waived by any Trustee. At any meeting at which every Trustee shall be present, even though without notice, any business may be transacted."

In *Bruch v. National Guarantee Credit Corporation*, (Del.), 116 Atl. 738, the Court held:

"Unless notice be given to each Director, as required by the by-laws of the corporation, the meeting is illegal, and the action taken is not binding."

There is also involved on this appeal, the question of the application of Section 2586 of Rem. Rev. Stat., of the State of Washington to this instant case, which provides:

"The false making or forging of any instrument or writing purported to have been issued by and in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation * * * is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

Date of Final Order or Judgment Appealed From

The "Original Judgment" of the State Supreme Court in this case was entered on March 29, 1943. An appeal

was duly taken from that Judgment to the United States Supreme Court and on December 6, 1943, the United States Supreme Court denied the appeal on the grounds it had no jurisdiction of the case and the Mandate of the United States Supreme Court was duly filed with the Clerk of the Supreme Court of the State of Washington on January 24, 1944, and under the ruling in *White* v. *Donini*, 173 Wash. 34, 21 Pac. (2d) 265, the State Supreme Court defines the State Statute that gave this Appellant a further remedy, namely:

> "Two questions are presented by the petition: (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the petition? and (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has power is beyond question under our decisions. Haaga v. Saginaw Logging Co., 170 Wash. 93, 15 Pac. (2d) 655; State Ex rel Cross v. Superior Ct., 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 172 Pac. 338. The present writer did not subscribe to the prevailing opinion in the recent Haaga case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered,' but 'newly created.' That is, that it was evidence of a condition that had arisen long after trial and judgment, and further, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also escapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

The case cited above, In Re Shilhshole, 101 Wash. 135, holds that when the Petition for relief is filed within one year after the final decision on all Appellant's rights on

the appeal, it is filed within the time prescribed by Statute of the State of Washington.

The Petition for relief in this case was duly filed with the Clerk of the State Supreme Court on June 23, 1944 and denied on July 21, 1944 and petition for rehearing was duly filed and denied on August 29, 1944, and the final order sought to be reviewed by this Court is dated August 29, 1944, and this application for appeal to this United States Supreme Court was presented to the Chief Justice of the State Supreme Court on November 20, 1944 and order allowing the appeal was entered on November 20, 1944.

Statement of Case

The Twisp Mining & Smelting Company, Appellant herein, on January 31, 1934 was the fee simple owner and in actual possession of certain Homestead lands and entitled to the exclusive possession and enjoyment of certain unpatented mining claims by virtue of a grant from Congress and also entitled to the exclusive possession and enjoyment of the Three Patented Mining claims of the Alder Group Mining & Smelting Company, by virtue of an "Executory Sale Contract" of date of November 23, 1927, executed by the Alder Group Mining & Smelting Company, as a defacto corporation and proof of those facts were duly recorded in the office of the Auditor of Okanogan County, Okanogan, Washington on June 27, 1932, in Volume 76 of Deed Records, at page 416, et seq.; and Volume 76 of Deed Records, at page 417, et seq.; and Volume 9 of Miscellaneous Records, at page 303, et seq.; as shown by the records and which facts were not disputed by any of the defendants in the action in Okanogan Superior Court in case No. 10158 of the records of that Court. (See St. pp. 10 to 21, for testimony of the Auditor on that subject.)

The basis of the Twisp Mining & Smelting Company's action in the Superior Court of Okanogan County, State of Washington, as shown by the trial Court's memorandum opinion of January 7, 1941, was:

> "It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the Trustees of the plaintiff in January, 1934 were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents of the Chelan Mining Company,—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934 when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effect to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding on the Twisp Mining and Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetration, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (See St. 342, for original.)

Robert H. Strong, testified on the trial of the action in Superior Court of Okanogan County, State of Washington, that he and his associates in the agreement of November 17, 1933, Mr. McDowell, Mr. Robinson and Mr. Julian, signed Exhibit No. 26, of date of December 12, 1933, which

was introduced in evidence (St. 157), and read from said instrument, as follows:

> "In the memorandum which the four of us enter under date of November 17, 1933, it was set out in paragraph 2 that we were to obtain a new contract satisfactory to the four of us from the Twisp Company" And then I go on and say: "If agreeable to you, I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer of stock, between a new company and the Twisp Company, or in any other manner enter an agreement with these people, if the same is done in the interest of all four of us and otherwise in accordance with the Spirit of the contract". (Meaning the November 17, 1933 contract). "That is my letter. I didn't read it completely." (St. 150, 151).

The part of the letter omitted by Mr. Strong reads as follows:

> "As things are developing now it is probable that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

And further testified:

> "These men that signed this agreement (Ex. No. 26) left all the details to me. That is the meaning of this agreement and those negotiations were ratified and approved at the time of the incorporation of the (Chelan Mining) company contained in the letter and set forth in the minutes that has already been identified and offered in evidence." The above testimony is shown in the record (St. 152) and the minutes referred to are shown in the record (St. 85 to 97).

The record shows that Mr. Strong, prior to the purported meeting of the Board of Trustees of the Twisp Company of date of January 17, 1934, obtained information from

James O. Cull, the Attorney for the Twisp Company, that the Executory Sale Contract (Ex. No. 4) of date of November 23, 1927, between the Alder Group Mining & Smelting Company, acting as a "Defacto Corporation" as Vendor and John L. Magney, as vendee, of the three patented mining claims was never cancelled and was in full force and effect and it was arranged between Robert H. Strong and James O. Cull that Robert H. Strong would form a new corporation, by the name of the Chelan Mining Company, to take over the assets of the Twisp Mining & Smelting Company and would want a representative Trustee in Washington. (St. 32.)

> Mr. Cull testified, "I knew at all times on January 29th, and on January 30th, when the last meeting was held, and on the 17th when the first meeting was held, that I was to be a local Director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan". (St. 35.)

The decision of the State Supreme Court, as reported in the Bound Official Volume, in case entitled, *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 133 Pac. (2d) 300, states the law of this case in regard to special meetings of the Board of Trustees of the Twisp Mining & Smelting Company, as follows:

> "The appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc. of Corporations, Vol. 2, p. 162, 393, is that, when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of Trustees, they are vested in the Trustees not individually, but as a board, and the Trustees can act so as to bind the Corporation only when they act as a Board and at a legal meeting. Appellant states that the rule and the reasons therefore are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. We may admit the

above rule is a correct statement of the law, but we fail to see where it is applicable here." Also see Trethewey v. Green River Gorge, 17 Wash. (2d) 697, at 727 and 728, 136 Pac. (2d) 1011, 1012, holding the same rule of law.

James O. Cull testified on the trial in the Superior Court of Okanogan, State of Washington, after admitting that four of the so-called Board of Trustees of the Twisp Mining & Smelting Company, which he maintained was a Board of Five Trustees, because John Goetz and Frederick C. MacDonald, although they were duly elected as Trustees of the Board of Seven Trustees, had not qualified, had signed a written consent to hold a special meeting of that so-called Board of Five Trustees on January 17, 1934, as follows:

"Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether or not that was a regularly called meeting * * *?

A. * * *. There was notice to the Directors that we recognized, *except Roy Magney, who was absent* and I didn't know at the time where he was. Mr. Simonds notice had been sent to him but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting." (St. 26) (Italics ours.)

In *Broughton* v. *Jones* (Mich.), 79 N. W. 691, the facts were:

The Board of Directors consisting of four Directors and two met and passed a resolution to mortgage all the property of the corporation. The Court held the mortgage void, saying:

"There does not seem to be any written record of the election of Directors, but we think it is clearly established that there were four directors, who undertook

to and did manage the affairs of the Company. Such authority, as was given at the special meeting of the Directors, at which meeting but two Directors were present, was invalid. There is nothing to show that the other Directors were even notified that such a meeting was to be held or that such action was to be taken. While the management of the Corporation is usually left to their Directors. *No Court,* so far as we know, has ever held that one-half of the Directors of a corporation, without the knowledge of the others, can dispose of all the property of a corporation by action at a special meeting, notice of which is not given to all of the Directors."

And Mr. Cull further testified:

"At the time the transaction was made with the Chelan and for months before that I had been unable to get in touch with Roy Magney, *who was a Director,* or learn his address and that was the reason for the meeting of the 17th of January. I was having correspondence at the time and hoped to get in touch with him in time for that meeting. *I didn't Send out Notices for the January 17 Meeting.* When Mr. Cole called attention to *that we sent out notices and called a meeting for the 30th.* I didn't get in touch with him for some time after that, but I learned his address and I mailed the notice to him at Denver, Colorado." (St. 52)(Italics ours).

Q. At whose suggestion was that meeting called?

A. Mr. Cole, an Attorney, at the suggestion of Mr. Strong, raised the question as to sufficiency of the notice.

Q. Was that the reason?

A. That was the reason another meeting was called for the 30th, * * *.

Q. Did you have a formal meeting (Of the Board of Trustees of the Twisp Mining & Smelting Company) which required the sending of formal notices between the 15th of August, 1932, and the 30th of January, 1934?

A. No." (St. 27).

The decision of the State Supreme Court, entitled *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 289, 133 Pac. (2d) 300, at 311, shows that Jeffers, J. who wrote the Opinion, ignored the Record, and based his opinion on a purported fact, which was manifestly contrary to the evidence, namely, that the purported Special Meeting of Board of Trustees of the Twisp Mining & Smelting Company of date of January 17, 1934 was a regular called special meeting of the Board of Trustees of the *Twisp Mining & Smelting Company* and *Scott V. McNeil*, 154 U. S. 34, 39, 38 L. ed. 895, reversed a decision of this same State Supreme Court, which held that the decision of a Probate Judge, which held that a man was dead, when in fact he was not dead, was a valid decision, and held:

> "The decision of the ordinary that the person on whose estate he acts is dead, if the facts be otherwise, does not invest the person he may appoint with the character of an Administrator".

And likewise the decision of the Trial Court and the State Supreme Court that the purported special meeting of the Board of Trustes of date of January 17, 1934, was a regularly called meeting, did not and could not be upheld, when the evidence positively shows that it was not a regularly called meeting and by reason of that fact, no legal special meeting was held and no legal resolution could have been and was not legally passed at such a purported informal special meeting and said purported resolution was in fact null and void from its inception.

The only power that the Board of Trustes of the Twisp Mining Company had to dispose of all the assets of the Twisp Company, is granted to them by virtue of Section 3803-36 of Remington's Revised Statutes (Sup.) of the

Uniform Business Corporation Act of 1933, which expressly provides:

> "A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange of shares in another corporation. * * *. *If the corporation be unable to meet its liabilities then matured, such authority may be by the vote of the Board of Directors*". (Italics ours.)

In Enright, as Trustee in Bankruptcy of the *New Foundland Syndicate* v. *Hecksher*, 240 Fed. (2nd. C. C. A.) 863, the Court in a similar case held:

> "The Newfoundland Syndicate is a corporation incorporated under the Laws of the State of New Jersey in 1904. It will be hereafter referred to as a Syndicate. The object for which the Syndicate was formed were inter alia, to purchase, acquire, or lease mines or mineral lands of every kind, nature and description, to work, prospect and develop mines and mineral lands, and to engage in and operate in mining of all kind. Law provided when a stockholder received stock, from a corporation as fully paid, for which he gave less than par, he is liable for interest, as damages for the retention of the money, on the balance due. *Trial Court held in substance that the spirit and policy of the act was so clearly opposed to any arrangement by which corporations shall issue stock without receipt by the company of an equivalent in value to its par that any arrangement to this effect must be void, as contrary to public policy of the law.* Citing Easton National Bank V. American Brick & Tile Co., 70 N. J. Eq. 722, 730, 64 Atl. 1095, where the Court of Errors and Appeals, referred to the New Jersey Corporation Act, declared that: "If any doubt has existed upon this question, it must be taken as settled by the decision of this Court in Volney V. Dixon, 68 N. J. Eq. 605, 60 Atl. 189." and the Court further held: "It seems from the minutes that there were five Directors present, but Munford was

interested in this transaction, and left the room or retired while the Directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he were there, even though he did not vote; but if he left the room, so as to leave only four Directors present, and nine were required, it seems clear there would have been no meeting at the time the action was taken, therefore there would be no finding by the Directors, as required by Section 49 of the Corporation Act or Law, that the value of the property transferred was equal to the value of the stock issued." *The Resolution purported to have been passed at that informal gathering of the four Directors was held to be a nullity.*

Likewise, in this instant case, Mr. Cull, Mr. Strong and his Attorney Mr. Cole, all admit that no notice of the holding of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 17, 1934, was ever given to Roy K. Magney, one of the Board of Trustees, which James O. Cull claims was a Board of Five Trustees, and Roy K. Magney was not present at the purported special meeting of January 17, 1934, therefore, as a matter of law, there was no legal meeting of the Board of Trustees of the Twisp Mining & Smelting Company was held on January 17th, 1934.

Therefore, as a matter of law, there could be no legal finding made by those "*Trustees*" that were present at that Informal Meeting, as required by Section 3803-36, paragraphs 1 & 2, of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933 that the Twisp Company was unable to meet its liabilities then matured for the obvious reason that those Trustees that were present at that "Informal Meeting" had no jurisdiction to even attempt to transact any business or to pass any resolution, which in any way purported to authorize the transfer of all the assets of the Twisp Mining & Smelting Company to

Robert H. Strong for the Chelan Mining Company, which was to be formed, and therefore the purported "Resolution" of date of January 17th, 1934, was absolutely null and void from it's inception under the authority of *Enright, as Trustee in Bankruptcy v. Hecksher*, 240 Fed. (2nd C. C. A.) 963, *supra*.

In accordance with the understanding and agreement of Robert H. Strong the Promoter of the Chelan Mining Company, with James O. Cull, prior to January 17th, 1934, the Chelan Mining Company was incorporated on January 26th, 1934, and Robert H. Strong, *James O. Cull*, James Cole, P. M. Robertson and George M. McDowell were named in the Articles of Incorporation, as the Board of Directors of the Chelan Mining Company (Tr. 56).

That Robert H. Strong, P. M. Robertson and George M. McDowell, who constituted a majority of the Board of Five Trustees duly held the initial meeting of the Board of Directors of the Chelan Mining Company on January 29th, 1934, and Robert H. Strong was elected as "President", and George M. McDowell was elected as Vice-President and P. M. Robertson was elected as Secretary and Treasurer and *James O. Cull* and James Cole were elected as Assistant Secretaries (St. 85 and 86). Thereupon Robert H. Strong presented a letter of date of January 29, 1934, to the "Directors" which is quoted on pages 87 to 91 of the Statement of Facts and the Trustees passed a resolution, which provided:

> "Be it resolved, that each and every offer, proposed or requested contained in Mr. Strong's letter to this company dated January 29th, 1934, hereinbefore set out, be, and they and each of them, are hereby accepted and in all respects approved, and granted, and "Be it Generally Resolved, That said Robt. H. Strong be, and he is hereby, given the authority and powers requested in and by said letter, whether they are in these resolutions specifically mentioned or not, as it is the desire

of these Directors to place Mr. Strong in a position to proceed in behalf and in the name of this company with the various matters and things referred to in the letter mentioned, in the manner and under the terms and conditions set forth in said letter, and

"BE IT FURTHER RESOLVED, That this Company, by and through its President and Secretary, issue and deliver to the Twisp Mining & Smelting Company a certificate of stock for 250,000 shares in payment for all of its right, title and interest in and to the certain mining & personal property mentioned, the description and nature of which this Board has knowledge * * *" (St. 92).

"BE IT FURTHER RESOLVED, That this Company assumes liability for and hereby agree to pay all expenses incurred to date by said Robt. H. Strong and his associates, and all such expenses which may hereafter be incurred by him in connection with any of the matters or things referred to in the letter hereinbefore set out or in connection with any of the properties herein mentioned or with any of the business of the Company, and" (St. 92).

James O. Cull, in his capacity of a "Director" of the Board of Directors of the Chelan Mining Company, and one of the Assistant Secretaries and local Agent of said Chelan Mining Company went to the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, of date of January 30th, 1934 for the sole purpose of illegally procuring all the assets of the Twisp Mining & Smelting Company for the Chelan Mining Company through it's President, Robert H. Strong.

In *Contractor's Machinery & Storage Company* v. *Stewart*, 177 Wash. 263, 31 Pac. (2d) 546, the State Supreme Court, settled the law of this state, in regard to notice of a corporation of knowledge of it's agents, saying:

"The Bald Point Logging Company claims to have taken title to the property here involved by a bill of

sale from Stewart in payment of his stock subscription. The logging company was organized by Stewart and Keagy, as it's principal promoters, for the purpose of taking over the equipment at Bald Point Camp and conducting the logging operations then contemplated by them. Another of the organizers of the Company was Joe Downer. Stewart, Keagy and Downer were elected Trustees at the Stockholders' Meeting and Stewart was elected President and Keagy Secretary of the Corporation. * * *. These are the men who were the principal stockholders, trustees and officers of the appellant corporation, and it is hard to conceive how knowledge of the transaction could be brought home more forcefully to the corporation. The corporation was the creation and instrument of Stewart, Keagy and their associates. They should not be permitted, under the circumstances disclosed by the record here to appropriate other people's property, then organize a corporation under its control and take the property over and hold it from them, free from the consequences of their wrongful acts."

James O. Cull, admitted under oath on the trial of this matter in the Superior Court of Okanogan County, State of Washington, that he prepared the purported minutes of that pretended Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934 as shown in Exhibit No. 7, that James O. Cull turned over to the New Secretary of the Twisp Mining & Smelting Company on April 5, 1939. (St. 183).

By examining these purported minutes of January 30th, 1934, that Mr. Cull prepared, which were not approved by any of the Trustees that were present, but which were simply "ATTESTED" by James O. Cull, as Secretary Pro Tem, there appears the following statements:

According to the purported minutes of the Board of Seven Trustees of the Twisp Company, which James O. Cull, as

"Secretary Pro Tem" of the Twisp Mining & Smelting Company prepared but which were never approved by any Member of said Board of Seven Trustees, inserted in those purported "Minutes", as follows:

> "A special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, * * *, was held * * *, on the above date * * * (January 17, 1934), said meeting being held by consent in writing of a majority of the Trustees, which consent was filed with the Secretary of the Meeting." "James O. Cull was appointed as Secretary Pro Tem, in the absence of Harold Simonds, the Secretary of the Company."

The fifth member of the Board, which James O. Cull falsely claimed was a Board of Five Trustees, was neither notified of the holding of the Special Meeting of the Board of Trustees for January 30, 1934, nor was present at that purported meeting. John B. Hottel and Chas. W. Julian were Trustees of the Board of Seven Trustees of the Twisp Company, but resigned and John Goetz and Frederick C. MacDonald were elected in place of Mr. Hottel and Chas. W. Julian and James O. Cull claimed they had never qualified and, therefore, there were two vacancies on the Board of Seven Trustees, but Section 3803-31, Par. 1, of Rem. Rev. Statute (Sup.), provided that Mr. Hottel and Mr. Julian held office as Trustees until their successors were duly elected and qualified and, as a matter of law, there were no vacancies on the Board of Seven Trustees during the month of January, 1934.

James O. Cull testified:

> "I didn't send out formal notices for the January 17th, meeting" (St. 52) and further testified:
> "There was notice to the Directors that we recognized, "Except Roy K. Magney", who was absent * * *. Mr. Simonds' notice had been sent to him but so far as a notice as required under the By-Laws to hold a meet-

ing to act upon the questions then considered, *it was not a regularly called meeting.*" (St. 26)

James O. Cull, having admitted under oath, that the purported Special Meeting of January 17, 1934, was not a regularly called Special Meeting, he, as a Director of the Board of Directors and as one of the Assistant Secretaries of the Chelan Mining Company, admitted that there was no legal Special Meeting of the Board of Trustees, whether it was a Board of Seven or a Board of Five held on January 17, 1934.

But this same gentleman, who also prepared the purported minutes of the purported Special Meeting of the Board of Trustees of the Twisp Company inserted in those minutes, the following:

> "The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, being a majority of the Board of Trustees as now existing. Absent, Trustee Harold Simonds, who had executed written consent to the Trustees Meeting of January 17, *of which this meeting is an adjournment*, said consent being duly inserted and shown in the Minute Records of the Company. Absent, Trustee Roy K. Magney, to whom notice of this meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

And the undisputable fact is that James O. Cull never mailed Roy K. Magney any notice of the holding of the Special Meeting of the Board of Trustees for January 30, 1934, and this fact was not discovered until after January 1st, 1944. And a further fact is that James O. Cull never swore to the purported "Affidavit of Mailing Notices" and therefore that unsworn affidavit is no proof of such mailing and that, coupled with the fact that John C. Sawbridge's affidavit found in the Petition for relief filed in this cause

with the Clerk of the State Supreme Court on June 23, 1944 shows that he never signed said notice for the call of the Special Meeting of the Board of Trustees for January 30, 1934 and completely disputes James O. Cull's false testimony in this case.

"Yakima, Washington
January 30, 1934.

A Special meeting of the Board of Trustees of TWISP MINING & SMELTING COMPANY, a Washington Corporation, was held at Room 208 Holzinger Building in the City of Yakima, Washington on the above date at the hour of 2:00 o'clock P. M. *pursuant to notice duly given by the President, copy of which is inserted in the Minute Record preceding the Minutes of this meeting.* (Italics ours).

The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, being a majority of the Board of Trustees as now exist. Absent, Trustee Harold Simonds, who had executed written consent to the Trustee meeting of January 17, of which this meeting is an adjournment, said consent being duly inserted and shown in the Minute Records of the Company. Absent, Trustee Roy K. Magney, to whom notice of this Meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company.

Mr. Cull, as Attorney for the Company and Secretary pro tem of the meeting, reported that two vacancies existed on the Board of Trustees, by reason of the failure of John Goetz and Frederick C. MacDonald, who were elected as Trustees on August 15, 1932, to qualify by taking the Oath of Office; and he submitted to the members of the Board assembled the question as to whether the vacancies so existing should be filled at the present time, or the Board of five members, as now constituted, continue in handling the business of the Company."

James O. Cull, being examined by Counsel for the Chelan Mining Company, testified on the trial in the Superior Court of Okanogan County, State of Washington, that he was appointed by action of the Board of Five Trustees of the Twisp Mining & Smelting Company, as it's Assistant Secretary on January 17th, 1934 and continued as such "Assistant Secretary" from that time up until the meeting of April 5, 1939. (St. 165, 166).

He further identified Exhibit No. 10, as being the certified copy of the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934, and swore said Exhibit 10 was a true copy of the original, which he prepared and inserted in Exhibit No. 7, and further testified:

> "Were you at that time Assistant Secretary of the Twisp Mining & Smelting Company?
> A. Yes, I had been so designated on the 17th." (St. 74).

In face of the purported minutes of the purported special meeting of January 17, 1934, that James O. Cull prepared himself, which show that James O. Cull merely acted at that "Informal Special Meeting of the Board of Trustees" as "Secretary pro tem in the absence of the regular Secretary, Harold Simonds" (See purported minutes attached to Exhibit No. 7, as proof of above facts).

Mr. Cull further inserted in the purported minutes of the purported informal special meeting of the Board of Trustees of date of January 30th, 1934, the following false statment:

> "Absent, Trustee Roy K. Magney, to whom notice of the meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company." (St. 184).

The purported Minutes of the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, which were prepared by James O. Cull, but never approved, show that James O. Cull was elected as Secretary pro tem and acted, but was not appointed as Assistant Secretary of the Twisp Mining & Smelting Company and there is no affidavit of James O. Cull of date of January 19, 1934, of the mailing of any notice to the Trustees for the holding of the purported special meeting of the Board of Trustees on January 30th, 1934, and that fact is further shown by James O. Cull, own testimony, to-wit:

There is attached to those purported minutes a purported copy of a purported "Notice of the Call of the purported Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 30th, 1934", and attached to that copy of the purported "Notice" is a copy of the void "Resolution" of date of January 17th, 1934. However, there is no "Original Notice" inserted in the Minute Records, for the obvious reason, as later will appear, there never was any "Original Notice" made. Mr. James O. Cull testified:

"Q. Did you mail a copy of that notice and resolution to each of the five men whom you have just mentioned as constituting the Board at that time?
A. Yes I did.
Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?
A. Yes." (St. 184).
"Q. And then I believe you also testified that it was Mr. Cole's suggestion that you call a second meeting for January 30th?
A. Yes. I agreed with him it was the proper thing to do because I had not mailed formal notice of the other meeting and had gotten consent. *I had been through the early part of January trying to learn Mr. Magney's address to take up the question with him*

and was unable to get it until I received his address on the 24th of January, 1934—his office address in Denver. I mailed a notice to him on the 24th of January, 1934." (St. 183, 184) (Italics ours).

The purported copy of the purported "Call" of the purported special meeting of the Board of Trustees for January 30th, 1934, that James O. Cull inserted in the Minute Record proceedings the purported Minutes of the purported special meeting of the Board of Trustees of January 30th, 1934 *was manufactured by James O. Cull. That fact was discovered during the month of January, 1944.* John C. Sawbridge gave the Twisp Company on June 15, 1944, his affidavit wherein he swore he never signed any Notice for the "Call" of a special meeting of the Board of Trustees for January 30th, 1934 and never authorized James O. Cull to mail any Notices to anyone for that meeting.

John C. Sawbridge's statement to John L. Magney's agent, prior to the making of his affidavit, led John L. Magney, President of the Twisp Mining & Smelting Company, to order James O. Cull's file of letters, which had been stored in Denver, Colorado, to be forwarded to him, and when they arrived on June 5, 1934, John L. Magney found James O. Cull's original letter to Roy K. Magney of date of January 24, 1934, which was addressed to 725 United National Bank Building, Denver, Colo. which recites as follows:

> "I think we contacted a live wire in the person of Mr. Strong, of Portland, who, I believe is capable of financing the development of the property, if it will show up properly under rigid examination. Mr. Strong recently made us a proposition, that he would organize a new Company to take over the rights (?) which we hold and give the Twisp Mining & Smelting Company a 10% share in all the Capital stock of the new company. * * * We held an 'INFORMAL MEETING' here on the 17th and adopted a resolution in

form as per copy herewith, I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the Trustees, informing him that there were only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds; there being two vacancies on the Board which resulted in 1932, when Hottel and Julian resigned and we elected Mr. Goetz and his friend, MacDonald of Seattle. Neither of them ever qualified by taking the Oath of Office, although I wrote each of them two or three times about it. I wish you might be present at this meeting; but, probably because of distance, and the intangible value of our "mines," you will not feel justified in tearing away from your business there and making the trip. In any event, drop me a line; and if you are willing to join us in this venture, kindly sign the approval form below the copy of the Resolution, if you cannot attend the meeting; and send it to us, so that I may file it with the other papers. * * * Sincerely yours, James O. Cull" (R. 6).

That letter disputed James O. Cull's statement in the purported Minutes of the purported special meeting of the Board of Trustees of January, 30th, 1934, to-wit:

"A special meeting of the Board of Trustees of the Twisp Mining & Smelting Company, was held at Room 208, Holtzinger Building, in the City of Yakima, Washington on the above date (January 30th, 1934) at the hour of 2:00 o'clock P. M. pursuant to notice duly given by the President, copy of which is inserted in the Minute Records preceding the Minutes of this meeting. * * * Absent, Trustee Roy K. Magney, to whom notice of this meeting was mailed as shown by the affidavit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

For the obvious reason that no President, and especially John C. Sawbridge, who was not the President at that time

of the Twisp Mining & Smelting Company ever signed any notice for the call of that special meeting of the Board of Trustees for January 30th, 1934 and it was absolutely impossible for James O. Cull to mail a copy of an instrument that never was made and James O. Cull's testimony to the effect that he did mail a copy of Notice for the call of a special meeting of the Board of Trustees for January 30, 1934, was absolutely false and untrue, and further James O. Cull's testimony that he was appointed by the action of the Board of Trustees, as Assistant Secretary, on January 17th, 1934 or any other time was false and untrue and proof of that fact is admitted by James O. Cull in the last paragraph of the purported minutes of the purported special meeting of January 30th, 1934, which James O. Cull prepared, to-wit:

> "Thereupon, the Secretary Pro Tem (Mr. James O. Cull) reported that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time, and that his absence from Yakima will continue for a considerable time in the future, and the question was submitted and considered as to whether an Assistant Secretary should be appointed with authority to act in all ways as Secretary of the Company during the absence of Mr. Simonds.
>
> Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted:
>
> Whereas, Harold Simonds, Secretary of this Company, has been absent from Yakima for several months; and it is anticipated that said Secretary will continue to be absent for some time; and
>
> Whereas, for the purpose of executing the instruments referred to in the Resolution just adopted by the Board, and for other purposes incident to the business of the Company, it is desirable that someone in Yakima, Washington be empowered to act as Assistant Secre-

tary and to execute any and all instruments or papers on behalf of the Company, and to keep the minutes and Records of the Company;

NOW THEREFORE, BE IT RESOLVED, that James O. Cull, of Yakima, Washington, *who has heretofore acted, and is now acting, as Attorney for the Twisp Mining & Smelting Company*, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to act in all matters pertaining to the Company business, and in keeping its records and executing instruments of conveyance or legal papers of any kind, the same as a Secretary of the Company might, or could do if personally present; all until further order or direction of the Board of Trustees evidenced by entry thereof in the Minute Records of the Company; and

BE IT FURTHER RESOLVED, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal.

"There being no further business to come before the meeting, it was, upon motion duly made, seconded and carried, adjourned.

Attest:

President.

JAMES O. CULL,
Secretary Pro Tem"

James O. Cull, prepared a certified copy of those purported minutes of January 30, 1934, exhibit #10, and attached to same the following affidavit:

"STATE OF WASHINTON,
County of Yakima, ss.:

This certifies, That the attached and foregoing is a full, true and correct copy of the minutes of a special meeting of the Board of Trustees of Twisp Min-

ing & Smelting Company, a Washington corporation, duly and regularly held pursuant to notice given as required in the By-Laws, on the 30th day of January, 1934, at the office of the Company, in the City of Yakima, Yakima County, Washington, which said meeting was attended and participated in by three Trustees of the Corporation, to-wit., being a majority in number of all Trustees of the Corporation;

All as appears from the original files and records of said Corporation now in my possession.

Dated this February 1, 1934.

JAMES O. CULL,
Assistant Secretary of Twisp Mining and Smelting Company."

On the trial in Superior Court of Okanogan County, State of Washington, James O. Cull was examined by Counsel for Chelan Mining Company, and testified as follows:

"By Mr. Johnson: Q. I would like to identify an exhibit. Will you look at this exhibit, Chelan Mining Company's Exhibit #10 for identification. Look at it and state whether or not that is your signature. That purports to be a certified copy of the special meeting of the Board of Trustees held January 30, 1934? A. Yes that includes the minutes.
Q. Were you at that time Assistant Secretary of Twisp Mining & Smelting Company? A. Yes, I had been so designated on the 17th.
Q. I will ask you if Exhibit #10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, Attorney at Portland, at his request? A. Yes.

Mr. Edelstein: * * *. Mr. Sawbridge purports to have signed the Minutes. * * *. John Sawbridge, President never signed the minutes.

Mr. Cull: I see Mr. Sawbridge's signature is not on the original." (St. 73, 74)

Mr. James O. Cull, in that "Certified Copy" of the "Purported Minutes" of the Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 30th, 1934, certifies as true, to the following facts, to-wit:

1st. That he as "The Secretary Pro Tem" reported (to that purported meeting) that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time and that his absence from Yakima will continue for a considerable time in the future; and the question was submitted and considered as to whether an Assistant Secretary should be appointed with authority to act in all ways as Secretary of the Company during the absence of Mr. Simonds.

2nd. Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted: * * *;

"Now, Therefore, Be It Resolved, that James O. Cull, of Yakima, Washington, *who has heretofore acted, and is now acting, as Attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to* act in all matters pertaining to the Company business * * *."

"Be It Further Resolved, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal."

And he further admitted that "John Sawbridge's" signature was not on the original, and therefore his certificate was false in that regard. (St. 74) And further false in saying that the purported meeting of January 30th, 1934, was duly and regularly held pursuant to notice given as required in the By-Laws." For

the obvious reason as already shown, that no notice was mailed to Roy K. Magney, one of the Trustees, and of necessity under such facts there was no legal meeting held on January 30th, 1934, and James O. Cull was never at any time appointed as the "Assistant Secretary" of the Twisp Mining & Smelting Company and his testimony to the contrary was false and untrue.

Section 2586 of Remington's Revised Statute, provides:

> "The false making or forging of any instrument or writing purporting to have been issued by and in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, * * * is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

In this instant case, James O. Cull was one of the Directors of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company and, as heretofore shown herein, he deliberately and knowingly gave perjured testimony in order to illegally obtain the assets of the Twisp Mining & Smelting Company and not only forged the certificate as "Assistant Secretary of the Twisp Company", but likewise "Forged His Name" to a quit claim deed, Exhibit No. 20, of date of January 31, 1934, and falsely represented that he was the "Assistant Secretary" of the Twisp Mining & Smelting Company, well knowing that he never was apointed as the Assistant Secretary of the Twisp Mining & Smelting Company at any time and had no authority to execute that quit claim deed as Assistant Secretary of the Twisp Mining & Smelting, and under the provisions of Section 2586 of Remington's Revised Statutes, that Quit Claim Deed was, in fact and in law, a "Forged Quit Claim Deed" and did not constitute a legal act of the Twisp Mining &

Smelting Company, but was, in truth and in law, the illegal act of the Chelan Mining Company.

> In Thompson, on Corporations (2nd ed.) page 729, Section 1645, it provides: "The general rule is that notice of a fact acquired by an agent, while transacting business of this principal, operates constructively as notice to his principal. As corporations, from their nature, can never act except through the instrumentality of their agents or their property, this principle applies with peculiar force to them. * * *. Where knowledge in and form will suffice, a corporation must be held to know what its President and chief officers know, since "a corporation cannot see or know except by the eyes or intelligence of its officers. * * *" And Section 1646, page 729, further provides: "Broadly speaking, the rule as to charging corporations with knowledge of their officers and agents is that notice communicated to, or knowledge acquired by, the officer or agent of a corporation, when acting in their official capacity or within the scope of their agency, becomes notice to or the knowledge of the corporation, and is binding upon it."

In *Almo Trust Company* v. *Cunningham* (*Tex.*), 203 S. W. 1105, the Court held:

> "The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statute as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

In *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Supreme Court of the State of Washington held:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parted with in reliance of the genuineness of the instrument, cannot claim protection against the title of the rightful owner. As some Courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor." See Commonwealth v. Wilson (Ky.), 12 S. W. 264, on same subject matter.

In this regard on page 270 of the Opinion of the State Supreme Court, the writer of the Opinion says:

> "It may be stated that this case was not presented to this Court by the same Counsel who tried the case for appellant, and we assume that the briefs were not prepared by Counsel who tried the case. We make this statement for the reason that Counsel on behalf of appellant in this Court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower Court; in fact no contention was made in the lower Court that the then Directors of appellant, or Strong, or the Chelan Mining Company, acted other than in good faith. The case was tried by appellant purely upon the theory that there was no quorum of the Directors present on January 17, or January 30th, 1934, authorized to pass the resolution, and that, therefore, the resolution passed on January 17, and adopted on January 30, was null and void. We therefore cannot consider the claim now made in this Court that the Deed was a forgery."

That statement was not true, but was in fact taken from the Respondent's Answer Brief on the appeal and is dis-

puted by the Trial Judge in his Memorandum Decision of January 7, 1941, to-wit:

> "In fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company * * * This being the situation, I must look upon the complaint as being a single purpose effort to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding of the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (St. 341, 342)

And there is now an affidavit of a stockholder in this record, showing that the forged deed was argued in the brief that was served on each of the defendants, with written acceptance of service by each Counsel for Defendants, and argued in open Court before the Trial Judge, conclusively showing that question of the forged Deed was raised in the lower Court and the position of the State Supreme Court is therefore not well taken. (See R. 19)

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been perjured. Here, even if we consider nothing but Mr. Cull's sworn admissions, we find a deliberate planned and carefully executed scheme to defraud the Appellant and the Courts of the State of Wash-

ington as well, and proof of the scheme, and of its success up to date is conclusive.

The "Appellees" wrongfully induced the State Supreme Court to hold that a legal resolution for the transfer of all of the assets of the Twisp Mining & Smelting Company could legally be passed at an "Informal Special Meeting" of its Board of Trustees, when even considering that the Board at that time was a board of five, only four of the Board were notified of the holding of the special meeting and the fifth Trustee was not even notified of the holding of the special meeting and was not present on January 30th, 1934, when that purported special "Informal Meeting" was held and further induced the State Supreme Court to hold that those four Trustees had authority to authorize anyone to execute a Deed in the name of the Twisp Mining & Smelting Company whereby all the assets of the Twisp Mining & Smelting Company could be legally transferred to Robert H. Strong for the Chelan Mining Company in face of Article II, Section 5 of the By-Laws of the Twisp Mining & Smelting Company, which provides:

> "Special meeting of the Board of Trustees shall be held whenever called by the President, or by one-third of the Trustees for the time being in office. The Secretary shall give notice of each special meeting by mail, * * *, to each Trustee; * * * ".
>
> And the decision, in Burch v. National Guarantee Credit Corporation (Del.), 116 Atl. 738, which holds: "Unless notice be given to each Director, as required by By-Law of the Corporation, the meeting is illegal, and action taken is not binding."
>
> And these Officers and Agents of the Chelan Mining Company further wrongfully induced the State Supreme Court to find that a Notice of that special meeting of the Board of Trustees of January 30th, 1934, signed by John C. Sawbridge, as President, was mailed to each Trustee on January 19, 1934, when no such signed notice ever existed and no copy of a purported

notice of the call of the purported special meeting of a Board of Trustees could be mailed to the Trustees by James O. Cull, one of the Directors, and one of the Assistant Secretaries and local agent of the Chelan Mining Company, when John C. Sawbridge swears that no such notice was ever signed by him, and without a bona fide notice existing, James O. Cull's testimony that he mailed a true copy to Roy K. Magney was false and untrue and the Chelan Mining Company is chargeable with the knowledge of its own officer who made that false statement under oath to mislead the State Supreme Court.

On page 281, of the Court's Official Opinion, 16 Wash. (2d) 264, 133 Pac. (2d) 300, of the *Twisp Mining & Smelting Company* v. *Chelan Mining Company*, the Court said:

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and after the conveyance by Mr. Strong and wife to the Chelan Mining Company, that Company issued to Twisp 250,000 shares of its stock, which was delivered to Mr. Cull and receipted for by him. *Twisp still holds this stock.*"

It must be remembered, as already shown herein, that James O. Cull was never the "Assistant Secretary" of the Twisp Company or any other officer, he was merely the Attorney of the Twisp Mining & Smelting Company, and it is held in *Lexington Gold Min. Co.* v. *Jefferson Min. Co.* (Colo.) 66 Pac. 677, on similar facts as this instant case, to-wit:

> "As proof of acceptance by the plaintiff of any deed, the foregoing evidence is a failure. It proved that Mr. Morrison, who was inferentially the legal advisor of the plaintiff, was himself satisfied with the deed of September 14th, and felt sure it would be accepted by the plaintiff. But merely as Counsel for the plaintiff he could not accept the Deed for it, or bind it by saying it would be accepted. He could advise the acceptance of

the Deed, but the plaintiff was at liberty to disregard his advice. It appears from the evidence that it did disagree with him, and refused to take the Deed, and that he so advised Mr. Jones. The defendant did not make even a prima facie case."

"Q. Did you (Mr. Cull) ever inform either of the Magneys of the receipt of the shares in the Chelan Mining Company? Did you inform the Magneys that you had that certificate? A. I couldn't say specifically they knew that I had it." (St. 51, 52)

James O. Cull testified that he attended the stockholders meeting of the Twisp Mining & Smelting Company that was held on April 5, 1939, and that he had with him the bunch of minutes "Exhibit No. 7" and that he turned them over to K. H. Blaesser, who became the new Secretary and that he then informed the new Secretary and one of the Magneys that he had the certificate of stock for 250,000 shares of the Chelan Mining Company's stock and that Mr. Blaesser informed him at the time, he didn't know whether they wanted to take it, but would inform him later on, and that later on Mr. Cull got the information or idea that the Twisp Mining & Smelting Company didn't want to accept the certificate and that Mr. Cull just continued to hold the stock and Mr. Cull never delivered that certificate of stock to the Twisp Mining & Smelting Company (St. 55, 56) clearly showing the statement of the State Supreme Court "Twisp still holds this stock" was not true.

Exhibit No. 44 was introduced by Mr. Gillespie, as proof of the fact that the "Executory Sale Contract" of date of November 23, 1927, made by the Alder Group Mining & Smelting Company, as a defacto corporation with John L. Magney for the sale of the three patented mining claims had been cancelled, when the Exhibit No. 4 itself shows there never was any cancellation of said "Executory Sale Contract" obtained by that pretended lawsuit.

Notwithstanding that it was adjudicated in the receivership action, that the attempt of the two surviving Trustees of the Alder Group Mining Company, to engage in new business on behalf of the defunct corporation under a pretended contract with the Chelan Mining Company and a purported lease with Mahlon McCain and Chas. W. Gillespie, was absolutely null and void, as shown in Exhibit No. 57, the Receiver illegally induced the Trial Judge to exceed his statutory power under Section 3803-53 of Remington's Revised Statutes (Sup.) and grant the Receiver to do that which had already been adjudicated he had no power to do. See *Gamble* v. *Alder Group Mining & Smelting Company, et al.*, 5 Wash. (2d) 578, 105 Pac. (2d) 810 *supra.*

This matter does not concern only private parties. There are issues of great moment to the public in a mining case and tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with good society. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

In *Davidson* v. *Hewitt*, 6 Wash. (2d) 131, 137, 106 Pac. (2d) 733, 736, the Court held:

> "Mere suspicion of wrong is not discovery of the fraud, nor is it a clue which respondent should have followed. Respondent may have been too trusting, but there is no showing of a lack of diligence on his part in detecting the fraud. The discovery contemplated by the statute (Rem. Rev. Stat. #159, subd. 4) is of evidential facts leading to the belief in the fraud and by which the existence of the fraud may be established. There is not, until 1939, a discovery of such fact as would, on reasonably diligent investigation,

> have led to knowledge of the fraudulent transfer; hence there was not, until 1939, discovery of the fraud."

So in this instant case, it was not until January, 1944, that it was discovered that James O. Cull never mailed any "Notice" of the call of the special meeting of the Board of Trustees for January 30th, 1934, to Roy K. Magney, one of the Trustees, and further discovered that John C. Sawbridge never even signed any notice for the call of that meeting and that the Chelan Mining Company and one of its Assistant Secretaries had perpetrated a gross fraud upon the Trial Court and the State Supreme Court of the State of Washington by reason of their false testimony, which was introduced to deliberately and intentionally obtain all the assets of the Twisp Mining Company without due process of law and without any consideration to the Twisp Mining & Smelting Company.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial

The Twisp Mining & Smelting Company is a corporation, existing by virtue of the laws of the State of Washington, and being a creature of law, whose life is dependent upon the provisions of law, must be governed strictly by those provisions of the law as provided by Section 3803-31, paragraph 1, of Remington's Revised Statutes of 1933, (Sup.) of the Uniform Business Corporation Act, which went into full force and effect on January 1, 1934, which provides:

> "* * * A director (or Trustee) shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

In this instant case, it is claimed by Appellees that John B. Hottel and Chas. W. Julian, resigned as trustees on August 15, 1932, and that John Goetz and Frederick C.

MacDonald were elected in their place and stead and by reason of these two newly elected Trustees failure to qualify as Trustees there were two vacancies on the Board of Seven Trustees during the month of January, 1934, in strict violation of Section 3803-31, paragraph 1 of Rem. Rev. Stat., of 1933, (Sup.) and the State Supreme Court upheld that view and denied the Twisp Mining & Smelting Company the equal protection of that law which provides that, although John B. Hottel and Chas. W. Julian had resigned, they still remained Trustees until their successors were duly elected and duly qualified and, therefore, there were no vacancies on the Board of Seven Trustees of the Twisp Mining and Smelting Company during the month of January, 1934.

The State Supreme Court was led into error by reason of its failure to read James O. Cull's sworn testimony that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 17th, 1934, was not a regularly called special meeting, and in holding that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of January 30th, 1934, was a regularly called meeting, when as now discovered the same condition that existed in reference to the purported special meeting of January 17th, 1934, existed as to the purported special meeting of January 30th, 1934, to-wit: No Notice of the holding of the special meeting of the Board of Trustees for the 30th of January, 1934, was ever given to Roy K. Magney, and therefore, as a matter of law, no legal special meeting of the Board of Trustees of the Twisp Mining & Smelting Company was ever held on January 30th, 1934, and no legal resolution could have been passed as a matter of law.

The Constitution of the United States being what it is, it is obvious that the entire proceedings of these appellees have been in direct violation of the Fourteenth Amendment to the Constitution of the United States and therefore there

is a "Federal Question" vitally important to the entire corporate practice in the United States, and that question is involved on this appeal and calls for the supervision of this Court to protect the stockholders' rights in the Appellant corporation, from being deprived of their property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and it is manifest, then, that the grounds presented by this Appellant to this Court for a review of this case are substantial.

Manner in Which Federal Questions Were Raised

The Federal Questions, here involved, were first raised to the trial Court, by the pleadings, as stated by the Trial Judge in his Memorandum of January 7, 1941, in ruling on the defendant's demurrers to the plaintiff's complaint where the Trial Judge said:

> "It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the Trustees of the plaintiff in January, 1934 *were wholly without authority and therefore did not bind the plaintiff corporation, and the illegal character of the performance was known to the officers and agents of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company.* * * *This being the situation I must look upon the complaint as being a single purpose effect to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein,* and that all the allegations in the complaint to the effect that the officers and agents of the

> Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetration, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalid and unholy character of the color of title which it acquired." (Italics ours)

In other words, the Trial Judge held that as he interpreted the allegations of the Plaintiff's complaint, the purported Deed of January 31, 1934, made in the name of the Twisp Mining & Smelting Company, by John C. Sawbridge, as President and James O. Cull, as Assistant Secretary, was made wholly without authority of the Twisp Mining & Smelting Company and that it did not bind the Twisp Mining & Smelting Company.

Section 2586 of Remington's Revised Statutes of the State of Washington, provides:

> "The false making or forging of any instrument or writing purporting to have been issued by or in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, * * *, is forgery in the same degree as if that person were in truth such officer or agent of such corporation."

In *State* v. *Fay* (Minn.), 83 N. W. 158, 159, the Court held in a criminal case on the question of forgery:

> "A 'Check' was signed 'P. McDonald, by John McDonald' and was held to be a forgery. The writing alleged to be forged purports on its face to have been executed by P. McDonald by John McDonald. Hence, it appears on the face of the instrument that, if it was genuine, it would possess legal efficiency as an order of P. McDonald for the payment of money. Therefore, a representation that John McDonald was authorized to execute it for P. McDonald. Now, when the defendant uttered the instrument as true, knowing it to

> be forged, he thereby represented and affirmed that the agent purporting to execute it for his principal had authority to do so. He is bound by his own representations, and it is unnecessary to allege in the indictment or prove on the trial such agency. Were it otherwise, all that it would be necessary for the party putting off forged paper to do in order to escape conviction would be to deal in such paper only as purported on its face to be executed by an agent for his principal, but who had no authority to represent the principal in any case."

In *Almo Trust Company* v. *Cunningham*, 403 S. W. 413, 414, the Court in the State of Texas held:

> "The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statute as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

The act of forging a deed or other instrument is an illegal act, and *Colby* v. *Title Insurance & Trust Company* (Cal.), 117 Pac. 915, 918, in passing on the validity of a deed that was obtained by an illegal act, held:

> "The doctrine of estoppel by conduct or by latches or even ratification, has no application to a contract or other instrument which is void, because it violates an express mandate of the law and dictates of public policy. Such a contract or instrument has no existence whatever for any purpose, and neither action or inaction of the parties to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."

And in *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Court said:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parties with in reliance on the genuineness of the instrument, cannot claim protection against the rightful owner. As some Courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

Counsel for the Receiver and Counsel for the Methow Gold Corporation, Appellees, herein, and Counsel for the Respondents in the State Supreme Court falsely stated to the State Supreme Court in their briefs on that appeal, as follows:

> Receiver's claim was: "In view of a very peculiar position by substitute Counsel for appellant in their opening brief in injecting the suggestion about a "FORGED DEED", it may be proper to point out that up to the time the brief was served, there had never been a charge of fraud, misconduct or intentional improper act on the part of any trustee or officer of the Twisp Mining & Smelting Company, *or on behalf of any other party to the litigation.* The complaint was drawn and the case tried solely on the theory that the lack of quorum rendered the proceedings void as a matter of law. *Certainly the Court will not permit the injection of any such claim into the case on appeal.* (Italics ours.)
>
> The Methow Gold Corporation falsely claimed: "In reply to the charge of forgery set forth in the briefs submitted by Appellant, we are prone to believe that that is the brain child of W. B. Mitchell, the clerk employed by Attorney W. G. Boland. There is no mention of forgery in the Trial Court and no argument about forgery before the Trial Court. Consequently, Judge

> Brown, the Trial Judge, would be surprised to learn there was an allegation of forgery in this case."

And by reason of those false statements of Counsel for the Appellees, the State Supreme Court in its Opinion at page 270 of the official printed Opinion, in 16 Wash. (2d) 264, 133 Pac. (2d) 300, held:

> "It may be stated that this case was not presented to this Court by the same Counsel who tried the case for the Appellant and we assume that the briefs were not prepared by Counsel who tried the case. We make that statement for the reason that Counsel on behalf of Appellant in this Court makes some claim that the Deed executed on behalf of Appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower Court that the then Directors of Appellant, *or Strong, or the Chelan Mining Company*, acted other than in good faith. *The case was tried by Appellant purely upon the theory that there was no quorum of the Directors present on January 17, or January 30, 1934, authorized to pass the resolution and that therefore the resolution passed on January 17, and adopted on January 30, was null and void.* We therefore cannot consider the claim now made in this Court that the Deed was a forgery." (Italics ours.)

In the *First Place*, the Rules of the State Supreme Court require the "Appellant" and the "Respondents" to make statement of the questions involved on the appeal. In this instant case, one of the questions involved as claimed by appellant, was:

> "Can three members of a Board of Seven Trustees of a private corporation *AT AN INFORMAL GATHERING* legally represent that corporation, or legally transact any business of any kind of that corporation or pass any resolution of any kind that will bind that corporation? Trial Court, in substance, answered 'yes'."

The Respondent, Chelan Mining Company, claimed the question involved was:

"Where articles of incorporation provide for a Board of Seven Trustees, and the By-Laws also provide that a majority of the Trustees, for the time being in office, shall constitute a quorum, is the action of three *at a regularly called meeting* and at a time wherein there are only five qualified and acting Trustees in office binding on corporation? The Trial Court answered in the affirmative."

Those two questions, show that the "question" of the "Forged Deed" was raised to the Trial Court, because the "Appellant's" question was whether three members of a Board of Seven Trustees had any power to transact any business of the corporation or pass any resolution of any kind at an informal gathering of three Trustees.

The State Supreme Court in Trethwey v. Green River Gorge, 17, Wash. (2) 697, 136 Pac. (2d) 1011, and in Twisp Mining & Smelting Company v. Chelan Mining Company et al., 16 Wash. (2d) 264, 133 Pac. (2d) 300, holds the law of the State of Washington is that a Board of Trustees of a corporation in the State of Washington can act only at legal meetings, but the State Supreme Court in this instant case adopted the false position of the Appellees and said:

"The meetings of January 17 and 30, 1934, were regularly called special meetings." When the testimony of the Chelan Mining Company's own officer clearly shows that neither of said purported meetings were regularly called meetings, but on the contrary, were simply "*Informal Gatherings*" where no business of the corporation could legally be transacted as a matter of law.

There is also an affidavit in the Appellant's Petition to the State Supreme Court for leave to file its Petition in the Superior Court of Okanogan County for relief from the judgment that was obtained by gross fraud of the Defend-

ants and by the knowing use of perjured testimony, which is not denied, showing:

> "That the question of the "Forged Deed" was raised in the Trial Court in Appellant's brief on Appellant's Motion to re-open the case for further evidence and a reconsideration of the Trial Court's Memorandum Decision of February 5, 1942, and a copy of that brief was served on each of the Counsels for Defendants, and each of them accepted service of same in writing and one of the Counsels for the Twisp Company argued the question of the "Forged Deed" to the Trial Court in the presence of said Defendants Counsel and, therefore, the statements of Counsel to This State Supreme Court that the question of the "Forged Deed" was not raised in the Trial Court were absolutely false and untrue and known to be false when made for the evident purpose of obstructing the due administration of law and justice to the Twisp Mining & Smelting Company and its stockholders, by unlawfully preventing the State Supreme Court from passing on the question of the forged Deed, which was one of the vital issues on said appeal.

Therefore that transaction comes within the ruling of the *Hotaling* v. *Hotaling* case (Cal.), 224 Pac. 425, 438:

> "By the resolution adopted by the remaining four, the President and Secretary were authorized to execute a Deed of conveyance to Richard M. Hotaling, one of the members of the Board present, of real estate belonging to the corporation. The Deed was executed and recorded. The Question of the validity and effect of the Deed formed the subject matter of this action. The Trial Court held the Deed was void and the Appellate Court affirmed the Trial Court's ruling and in doing so, used this language: * * * 'the claim under which Richard M. Hotaling claims as an attempted corporate act, must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors

in whom was vested the sole power to give such authorization."

In this instant case, James O. Cull claims that the Board of Trustees of the Twisp Mining and Smelting Company adopted a void resolution that was unlawfully attempted to be passed at a purported Special Meeting of the Board of Trustees of date of January 17, 1934, which everyone present at that purported Special Meeting admitted was illegally held. This same Mr. Cull falsely swore that John C. Sawbridge signed a purported call for the holding of another special meeting of the Board of Trustees to be held on January 30th, 1934, to correct the mistake that occurred in regard to the purported Special Meeting of the Board of Trustees of date of January 17th, 1934, but John C. Sawbridge, as already shown, swore under oath that he never signed any notice for the call of that purported Special Meeting of the Board of Trustees of the Twisp Mining & Smelting Company and as a matter of fact there is no such signed notice in existence and James O. Cull's testimony was absolutely false and untrue and known by Mr. Cull to be false and untrue when he gave such testimony and, therefore, as a matter of law, there being no original notice signed by John C. Sawbridge, there could have been no notice mailed to Roy K. Magney and Roy K. Magney was absent from the purported "Informal Special Meeting" of the Board of Trustees of date of January 30th, 1934, and there was no legal meeting of the Board of Trustees held on that date and, of necessity, there could not be any legal adoption of resolution at that Informal Special Meeting as a matter of law and there was not, and could not be, any legal authorization given at that Informal Special Meeting to either John C. Sawbridge or James O. Cull to execute any Deed and John C. Sawbridge's and James O. Cull's signatures placed on that purported Deed of January 31, 1934, under the provi-

sions of Section 2586 of Rem. Rev. Statutes of the State of Washington, were forgeries and were made on behalf of James O. Cull to purport a gross fraud on the Trial Court and the State Supreme Court for the sole purpose of illegally obtaining all the assets of the Twisp Mining & Smelting Company without legal authority and without any consideration therefor.

The question of the "Forged Deed" was raised in the Trial Court in Appellant's written briefs, on Appellant's Motion to re-open the case for admission of two exhibits and to reconsider the Court's Memorandum of February 5, 1942, on the merits, and a copy of the written brief was served on each Counsel for the Defendants and each Counsel for Defendant accepted service of same in writing and one of the then Counsels for the Twisp Mining & Smelting Company argued the question of the forged Deed to the Trial Judge in the presence of Counsels for Defendants and the statements of Counsel for the Appellees to the State Supreme Court that the forged Deed was never raised in the Trial Court is, and was, absolutely false and untrue and known to be false and untrue when made for the sole and only purpose of obstructing the due administration of the law to the Twisp Mining & Smelting Company.

And the Trial Judge, in the absence of Appellant or its counsel on February 25, 1942, entered a final judgment, and found, and decided in said Judgment & Decree as follows:

> "Now in accordance with said Memorandum Decisions (of February 5, and February 25, of 1942) the Court finds and decides that the Deed dated January 31, 1934, wherein the Plaintiff, the Twisp Mining & Smelting Company, war grantor and Robert H. Strong was Grantee, which Deed was filed for record on the 21st day of February, 1934, in Book 77 of Deeds at page 625 in the office of the County Auditor of Okanogan County, State of Washington, is valid in all respects;

that the execution of said Deed was authorized by the vote of the majority of the Board of Directors of the Twisp Mining and Smelting Company at a meeting which had been duly and regularly called and at which a quorum was present; that said Deed is valid and binding on the Plaintiff, and that Plaintiff, by reason of said conveyance by it and by reason of having ratified and confirmed said Deed and by reason of estoppel and latches cannot prevail in this action, and that its said action should be dismissed; and Plaintiff's motion for new trial having been denied; Now, therefore, it is ORDERED, ADJUDGED AND DECREED that the Plaintiff take nothing by its said action and said action is hereby dismissed with prejudice, * * * Done in Open Court this 25th of February, 1942. Wm. C. Brown, Judge." (Tr. 138, 139)

That Judgment was entered by Hon. Wm. C. Brown, with positive knowledge that said Defendants in open Court dismissed any right to affirmative relief, and still the Trial Judge dismissed the Plaintiff's action with prejudice, which is in law affirmative relief (St. 357). And the said Defendants in the Lower Court and Appellees in the State Supreme Court practiced fraud upon the State Supreme Court when they, after dismissing any right to affirmative relief in the Lower Court, insisted upon their so-called affirmative defenses on the appeal to the State Supreme Court under the authority of *Seeley* v. *Gilbert,* 16 Wash. (2d) 611, 134 Pac. (2d) 710 under the statutes of the State of Washington, in a case like this instant case, as held in *Haaga* v. *Saginaw Logging Co.,* 170 Wash. 93, 15 P. (2d) 655, is granted power to make an order upon the "Original Application" of an aggrieved party, permitting the aggrieved party to petition the Superior Court where the trial was originally held, for a new trial, or in the alternate, to file a motion with the Trial Court to re-open the case for further evidence as

held in *White* v. *Donini*, 173 Wash. 34, 21 Pac. (2d) 265, to-wit:

> "Two questions are presented by the petition (That is the Original Petition like the one presented to the State Supreme Court in this instant case): (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the Petition? And (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has such power is beyond question; under our decisions. Haage v. Saginaw Logging Co., 170 Wash. 93 15 P. (2d) 655, State ex rel. Cross v. Superior Ct. 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 172 Pac. 338. The present writ did not subscribe to the prevailing opinion in the recent Haaga Case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered', but 'newly created'. That is, that it was evidence of a condition that had arisen long after trial and judgment, and furtner, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also excapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

Referring to the case entitled, *In Re Shilshole*, 101 Wash. 135, 172 Pac. 338, the question of when the year statute provides to bring the action for relief, began to run and it was held that it did not begin to run until all appeals permitted by law were duly ended and in this instant case, the mandate from the United States Supreme Court having been filed with the Clerk of the State Supreme Court on January 24, 1944, the year would begin to run from that date, and the Original Petition for relief was duly filed with the Clerk of the State Supreme Court in this instant case on June 23, 1944, within the time allowed by law.

The Constitution of the State of Washington under Article IV, Section 2, pertains to the duties of the Supreme Court and provided:

> "In determination of causes, all decisions of the Court shall be given in writing, and the grounds of the decision shall be stated."

The Petition of Appellant for relief to the State Supreme Court was set down for hearing for Friday, July 21, 1944, the Respondents did not deny any of the allegations of the Twisp Company in said Petition and Clyde G. Jeffers, who wrote the original opinion of the State Supreme Court, presided as Acting Chief Justice, and refused to allow Counsel for the Twisp Company more than 15 minutes to present the Twisp Company's case and merely entered in the Motion Docket the words:

> "Motion to present to Superior Court, petition for new trial or in the alternate petition to re-open the case for additional evidence. DENIED.
>
> (Signed) Clyde G. Jeffers, Actg. Chief Justice." Without writing any opinion or stating any grounds for said denial as provided by the State Constitution it was his duty to do.

A Petition for rehearing was duly filed within the time allowed by law and on August 29, 1944, Clyde G. Jeffers, acting as Chief Justice, entered an order, without any written Opinion which provides:

> "The Court having considered the Appellant's petition for a rehearing of its "Petition for Leave to Present to the Superior Court its Petition for a new trial or, in the alternate, a Petition to Re-open Case for Additional Evidence,"
>
> IT IS ORDERED that the Petition for Rehearing be and the same is hereby denied. Dated this 29th day of August, 1944:
>
> By the Court: CLYDE G. JEFFERS,
> *Acting Chief Justice.*

And the Twisp Mining & Smelting Company was denied a substantial right without a hearing within the meaning of the Fourteenth Amendment to the Constitution of the United States under the ruling in *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed., 54, 84 A. L. R. 527.

And in *Harry Pyle, Petitioner*, v. *State of Kansas and Milton P. Matine, Warden of Kansas Penitentiary*, 317 U. S. 213, 216, 87 L. Ed. 214, 216, in a *Habeas Corpus* case, for relief of an improper conviction, the Court held:

> "No return was made to the application for the writ. On December 11, 1941, the Court below entered an order "that said petition be filed and docketed without costs, and thereupon, after due consideration by the Court, it is ordered that said petition for the writ of habeas be denied." *There was no* opinion. A motion to re-hear was also denied without opinion. We brought the case here on certiorari, 316 U. S. 654, 86 L. ed. 1734, 62 S. Ct. 1045, because of the constitutional issue involved.

Cases Believed to Sustain Jurisdiction of This Court

Mooney, Petitioner v. *Holohan, Warden*, 294 U. S. 103, 79 L. Ed. 791, 794, as quoted in *Jones* v. *Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, at 338, where it holds that a criminal conviction obtained by the knowing use of perjured testimony must, with equal abhorence be condemned, as a traversy and in addition to the foregoing cases this Court in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Laws Advance Opinions, 936, held:

> "Federal Courts, both Trial and Appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgment was finally entered, Brownson v. Schulten, 104 U. S. 410, 26 L. ed. 797. * * * This is not meant, however, that a judgment finally entered has ever been regarded as completely

immune from impeachment after the term. From the beginning there existed along side the term rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. (Cases Cited) This equity rule, which was firmly established in English practice long before the foundation of our Republic, the Courts developed and fashioned to fulfill a universal recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from the rigid adherance to the term rule. * * *. Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulent begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the patent office, but the Circuit Court of Appeals. Cf. Marshall v. Homes, 141 U. S. 589, 33 L. ed. 870, 12 S. Ct. 62, Supra. Proof of Scheme and its complete success to date, is conclusive."

In this instant case, James O. Cull, was manifestly acting solely for the interests of the Chelan Mining Company. He had no further interest in the Twisp Mining & Smelting Company or its stockholders. He was a Director of the Board of Directors of the Chelan Mining Company and one of its Assistant Secretaries and his acts were the acts of the Chelan Mining Company and he knew that Roy K. Magney had never been advised of the holding of a special meeting of the Board of Trustees of the Twisp Company for January 30th, 1934, and he also knew that the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30th, 1934, was merely an "Informal Meeting" of a few of the Trustees, who had

no power or legal authority to transact any business of any kind of the Twisp Company and that all attempts of those few Trustees that were present at that informal special meeting to do so were absolutely null and void.

When James O. Cull turned over to K. H. Blaesser, Exhibit No. 7, Mr. Blaesser specifically asked him, according to K. H. Blaesser's affidavit, if he had any other papers or instruments of the Twisp Mining & Smelting Company and he answered that he had nothing else and it was not until April 4, 1944, that the Twisp Mining & Smelting Company was able to find out that James O. Cull's statements to K. H. Blaesser were false and untrue and the Twisp Mining & Smelting Company submits in good faith that the foregoing clearly shows that this United States Supreme Court has jurisdiction of this instant case and should take jurisdiction and protect the stockholders from having their rights in the property involved deliberately confiscated without due process of law on a "Forged Deed", as heretofore clearly pointed out in the foregoing State As to Jurisdiction.

In *Dehnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 Law ed. 239, 242, this Court held:

> "In the State Court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but insisted that, as to the transaction in question, the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The Court did not accede to the insistence, but applied the statute. Of course, that was an affirmance of its validity when so applied. * * *. *The case is therefore of the class described in the first section.* That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet be valid as applied to another. * * *. The provisions quoted from the jurisdic-

> tional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends upon the way in which the State Court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error (Now Appeal), and if it be resolved against the validity, the review can only be by writ of certiorari. The provisions take no account of the particular grounds or reasons which the decision is put.

That is to say, if it be resolved in favor of the statute, as enforced by the State Supreme Court, the review may be on writ of error. In this instant case, resolved the question in favor of the Statute as it applied to the statute, that is to say, that the State Supreme Court held that Section 3803-31, paragraph 1, of Remington's Revised Statute (Sup.) of the Uniform Business Corporation Act although it provided that "Trustees" shall hold office until their successors are duly elected and qualified, still if two Trustees of a Board of Seven Trustees resign and two other Trustees are elected as members of that Board of Seven Trustees, but fail to qualify by reason of the claimed fact they never signed their "Oath of Office", that there were two vacancies on the Board of Seven Trustees, which reduced the Board of Trustees to a Board of Five Trustees, which position was repugnant to the provisions of Section 3803-31, paragraph one, of Remington's Revised Statutes of the State of Washington and by said wrongful construction the Twisp Mining & Smelting Company was deprived of the equal protection of the laws of the State of Washington in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit, then, that this United States Supreme Court has jurisdiction of the instant appeal by

virtue of the statutory provisions quoted on page 3 of Appellant's Statement as to Jurisdiction and the foregoing showing therein.

Respectfully submitted,

LUCIUS G. NASH,
Attorney for Appellant.

IN THE

SUPREME COURT

OF THE

State of Washington

TWISP MINING & SMELTING COMPANY, a corporation,

Petitioner,

vs.

CHELAN MINING COMPANY, a corporation; SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the Alder Group Mining & Smelting Company, a defunct corporation, and METHOW GOLD MINING CORPORATION, a corporation,

Respondents.

No. 28798

Petitioner's Petition for Rehearing en Banc of Its Petition for Leave to Present to the Superior Court, Its Petition for a New Trial, or in Alternate, a Petition to Reopen Case for Additional Evidence.

JOSEPH F. MORTON,
Attorney for Petitioner.
Address: 301 Title Bldg., Spokane, Washington.

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Comes now Petitioner, Twisp Mining & Smelting Company, and respectfully petitions the

above entitled court for a rehearing of its petition for leave to present to the Superior Court of Okanogan County, State of Washington, its motion for a new trial of this cause or in the alternate for leave to present to the Superior Court of Okanogan County, State of Washington, its motion to re-open the case for additional evidence and for a rehearing en banc before the entire Supreme Court on the grounds and for the following reasons:

1. The present "Petition" is an "Original Petition" that is filed in this Supreme Court for leave of this Supreme Court to apply to the Superior Court of Okanogan County. State of Washington, for relief which this Court in *Haaga v. Saginaw Logging Co.*, 170 Wash. 93, 15 P(2d) 655, and *White v. Donini*, 173 Wash. 34, 21 P(2d) 265, holds that this Court has original jurisdiction to grant and Article IV, Section 2 of the Constitution of the State of Washington, provides:

> "* * * In the determination of causes, all decisions of the court (Supreme Court), shall be given in writing, and the grounds of the decision shall be stated. * * *"

In this instant case, the Petitioner by formal Motion requested additional time to present this matter on oral argument. However, the Judge who wrote the opinion, acting as the Chief Justice, denied that request, and on July 21, 1944, also acted as the Chief Justice and only allowed Counsel for Petitioner fifteen minutes to present the Petitioner's case, which was wholly inadequate for said Counsel to present the Petitioner's case and the Department which heard this matter committed error in filing no written opinion, but simply denying the "Petition" without further comment contrary, as Counsel believes, to the provision of Article IV, Section 2 of the State Constitution.

Since the Judgment of the Superior Court of Okanogan County, State of Washington, was appealed to this Court and this Court affirmed the judgment of the lower court and this Court granted the Petitioner an appeal to the Supreme Court of the United States and the mandate of Supreme Court of the United States having been filed in the Clerk's Office of this Supreme Court on January 24, 1944, this Petition which was filed with the Clerk of this Court on June 23, 1944, was

timely filed within the period prescribed by Section 467 of Remington's Revised Statutes, as held by this Court in *In re Shilshole Avenue*, 101 Wash. 135, 141, 172 P. 338.

2. The record shows, as stated by the Trial Judge (St. 357):

> "At the close of the trial the attorneys for all the defendants announced in open court that they did not seek to have the court adjudicate their rights affirmatively. They stated they were only interested in defeating the claim of the plaintiff and that they did not want their respective rights adjudicated amongst themselves. They all declared that they could settle their respective rights themselves without any interference of the court. This being the situation I presume all the court should do is to enter a decree that plaintiff has not shown itself entitle to recover anything against the defendants and that therefore its action will be dismissed as to the defendants, and in view of that outcome the defendants are dismissing any right to affirmative relief on their part."

And this Court had no jurisdiction and committed a reversible error when it considered and acted upon the defendant's purported affirmative defenses after these defendants dismissed any

right to affirmative relief on their part under the authority of *Seeley v. Gilbert*, 16 Wash. (2d) 611, 134 P(2d) 710, and the respondents practiced fraud upon this Supreme Court when they, after dismissing any right to affirmative relief in the lower court, insisted upon their so-called affirmative defenses on the appeal to this Court.

3. Petitioner, the Twisp Mining & Smelting Company, charges that the judgment of the Superior Court of Okanogan County, State of Washington, and the affirmance of same by this Supreme Court has deprived this Petitioner of its property and property right without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States. The grounds of its charge are, in substance, that the sole basis of the "Judgment of the Superior Court of Okanogan County, State of Washington, and the affirmance of same by this Supreme Court was perjured testimony, which was knowingly used by the defendants on the trial in the Superior Court of Okanogan County, State of Washington, and adopted by the Department of this Court that rendered the opinion of this Court on January 18, 1943, as

reported in *Twisp Mining & Smelting Company, Appellant, v. Chelan Mining Company et al., Respondents,* 16 Wash. (2d) 264, 133 P(2d) 300, in order to obtain said judgment and affirmance thereof, and also that the said defendants in the Superior Court of Okanogan County, State of Washington, and in this Court deliberately suppressed evidence which would have impeached and refuted the testimony thus given against the Twisp Mining & Smelting Company.

> 4. The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities declared and protected when such action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of the United States Supreme Court to inquire whether the decision of the State Courts rest upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus denied. *Lawrence v. Tax Commission,* 286 U. S. 276, 282, 76 L. Ed. 1102, 1106.

5. The record in this cause, as held by the Trial Judge, shows the basis upon which the Petitioner's action was founded in the Trial Court, to-wit:

7

"It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the plaintiff in January, 1934, were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents and managing officers of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effort to set up the invalidity in the conveyance on the sole grounds that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be considered merely for the purpose of showing that the Chelan Mining Company has notice all along of the invalidity and unholy character of the color of the title which it acquired." (St. 341, 342 —Petition herein p. 13)

6. The Record in this cause shows, that Robert H. Strong, the President of the Chelan Mining Company, testified that he signed the instrument marked for identification as Exhibit No. 24, of date of November 17, 1933, and that his associates in the promotion enterprise of the Chelan Mining Company, also signed that instrument (St. 140). He further testified that he had authority from his associates to enter into negotiations with the Twisp Mining & Smelting Company leading up to the culmination of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30, 1934, and that Mr. McDowell and Mr. Robinson, two of his associates in the agreement of November 17, 1933, were two of the directors of the Chelan Mining Company, who with himself, held the organization meeting of the Chelan Mining & Smelting Company on January 29, 1934 (St. 150).

He further testified, that he and his associates in the agreement of November 17, 1933, Mr. McDowell, Mr. Robinson and Mrs. Julian, signed Exhibit No. 26, of date of December 12, 1933,

which was introduced in evidence (St. 157), and read from said instrument, as follows:

> "In the memorandum which the four of us enter under date of November 17, 1933, it was set out in paragraph 2 that we were to obtain a new contract satisfactory to the four of us, from the Twisp Company." And then I go on and say: "If agreeable to you I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer of stock, between a new company and the Twisp Company, or in any other manner enter an agreement with these people, if the same is done in the interest of all four of us and otherwise in accordance with the spirit of the contract." (Meaning the contract of November 17, 1933) "That is my letter. I didn't read it completely." (St. 150, 151)

The part of the letter omitted by Mr. Strong read as follows:

> "As things are developing now it is probable that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

He further testified:

> "These men that signed this agreement (Ex. No. 26) left all the details to me. That is the meaning of this agreement and those negotiations were ratified and approved at the time of the incorporation of the company contained in the letter and set forth in the minutes that has already been identified and offered in evidence."

The above testimony is shown in the record (St. 152) and the minutes referred to is shown in the record (St. 85 to 97).

And James O. Cull testified: "Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington" (St. 32). He further testified:

> "I knew at all times, on January 29, and on January 30, when the last Twisp meeting was held, and on the 17th, when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. *That had been understood and arranged that I was to act as a director of the Chelan.*" (St. 35) (Italics ours)

And for the convenience of this Court to save repetition Petitioner will quote from 19 C. J. S.

477, Section 1006, the law governing James O. Cull acts in the purported transfer of all of the assets of the Twisp Mining & Smelting Company to the Chelan Mining Company:

> "A corporate officer or agent, however, cannot without the corporation's knowledge and consent, represent it in a transaction with another corporation which has opposing interests, and in which he is interested as director or other officers."

In this instant case, as above admitted by James O. Cull, it had been understood and arranged prior to January 17, 1934, with Robert H. Strong, the promoter of the Chelan Mining Company, that he was to act as a director of the Board of Directors of the Chelan Mining Company in the transactions with the Twisp Company in question in this cause. The record further states that James O. Cull was named on January 26, 1934, in the Articles of Incorporation of the Chelan Mining Company as one of Directors of the Board of Directors (Tr. p. 56), and also was elected as one of its assistant secretaries on January 29, 1934 (St. 86) and Robert H. Strong was elected as the President of Chelan

Mining Company on January 29, 1934 (St. 85) and since it will be later shown herein that there never was any legal special meeting of the Board of Trustees of the Twisp Company held on either the 17th or 30th of January, 1934, there never was any legal consent obtained from the Twisp Company by James O. Cull, which authorized him to represent the Twisp Company in the illegal transaction that James O. Cull acted in as director and assistant secretary for the Chelan Mining Company.

The By-Laws of the Twisp Company, Article II, Section 5, provides:

> "Special meeting of the Board of Trustees shall be held whenever called by the President, or by one third of the Trustees for the time being in office. *The Secretary shall give notice of each special meeting by mail*, the same to be at least two days before the meeting or by telegraph at least one day before the meeting, *to each trustee.*" (Italics ours)

The only officer of the Twisp Company, that had any power or authority to mail notices of a special meeting of the Board of Trustees was the Secretary, who was Mr. Harold Simonds, and

James O. Cull, who was neither the Secretary or Assistant Secretary, as later will appear herein, had no power or authority to mail any notices to the trustees for any special meeting of the Board of Trustees. Notwithstanding that undisputable fact, James O. Cull testified:

> "Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether or not that was a regularly called meeting or whether that was one of the informal meetings that the members held?
>
> A. I wouldn't say there was an informal meeting. *There was notice to the directors that we recognized, except Roy Magney, who was absent and I didn't know where he was. Mr. Simonds' notice was sent to him but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting.*" (St. 26) (Italics ours)

He further testified:

> "At the time the transaction was made with the Chelan and for months before that I had been unable to get in touch with Roy Magney, who was a director, or learn his address, and that was the reason for the meeting of the 17th of January. I was having

correspondence at the time and hoped to get in touch with him in time for that meeting. *I didn't send out formal notices for the January* 17 *meeting. When Mr. Cole called attention to that we sent out notices and called a meeting for the* 30th. *I didn't get in touch with him for some time after that, but I learned his address and I mailed the notice to him at Denver, Colorado, and it never was returned though it had my return address.*" (St. 52)

"HOWEVER" Mr. James O. Cull admits that testimony was not true, because he further testified:

"Q. You (Mr. Cull) had not discussed with John L. Magney or Roy K. Magney any of the details of this deal prior to the time, or up to the time of the meeting of January 17, 1934?

A. No." (St. 79)

"Q. You did say in your cross-examination that John and Roy Magney participated in all the informal meetings and knew all about what was going on, but you want to correct that now to say they didn't know so far as you know, about this particular transaction?

A. I knew in the fall of 1933 they were in Colorado because one of them had mailed me a newspaper with a marked section showing

the transaction of some business there." (St. 79)

"Q Did you personally, or did any of the directors of the company personally in your presence, ever discuss this Strong deal at any time that it was under obligation, with the Magneys?

A. No, but I did, prior to the holding of the meetings in January, try to locate the address of the Magneys. I wrote a friend of mine in Spokane, a Mr. Marshall.

Q. That was not in answer to my question.

A. No, I will confess I don't know they knew anything about it; they didn't discuss it with us; didn't have any opportunity to." (St. 80)

It is clear from the foregoing that James O. Cull testified, as a Director of the Board of Directors and as one of the Assistant Secretaries of the Chelan Mining Company for the sole purpose of attempting to conceal the fact as his testimony shows that he knew all the time after the fall of 1933, where both John L. Magney and Roy K. Magney were located.

Mr. James O. Cull further testified:

"Q. At whose suggestion was that meeting called?

A. Mr. Cole, as attorney, at the suggestion of Mr. Strong, raised the question as to the sufficiency of the notice.

Q. Was that the reason?

A. That was the reason another meeting was called for the 30th, and formal notice issued and sent out." (St. 54)

"Q. Did you have a formal meeting (of the Board of Trustees of the Twisp Company) which required the sending of formal notices between the 15th of August, 1932, and the 30th of January, 1934?

A. No." (St. 27)

Mr. James O. Cull was called as a witness for the Chelan Mining Company and being examined by Charles A. Johnson, of Counsel for the Chelan Mining Company, testified as follows:

"Q. I believe you wrote up the minutes of that (January 17) meeting, did you not?

A. Yes.

Q. And also of the meeting of January 30 which followed?

A. Yes." (St. 183)

"Q. Attached to these minutes and proceedings contained in Exhibit 7 is a notice of the meeting and attached to the notice is a form of the Resolution to be adopted?

A. Yes.

Q. You are familiar with that?

A. Yes.

Q. Did you mail a copy of that notice and resolution to each of those five men whom you have just mentioned as constituting the Board at that time?

A. Yes, I did.

Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

A. Yes." (St. 184)

Q. Mr. Cull, for how long were you connected with the plaintiff, Twisp Mining & Smelting Company, either as attorney or as an officer of the company?

A. I was attorney for the company from the time it was organized up to the 5th day of April, 1939, and was acting secretary for a good part of the time, and on January 17, 1934, was appointed by action of the Board as Assistant Secretary.

Q. Have you since your election continued to act as Assistant Secretary of the * * * Twisp Mining & Smelting Company?

A. Yes, up until the meeting of April 5, 1939.

Q. From January, 1934, then until April,

1939, you were the duly elected and acting Assistant Secretary of the Twisp Mining & Smelting Company?

A. Yes." (St. 166)

The Department of this Supreme Court, which rendered the opinion in this case as reported in *Twisp Mining & Smelting Company v. Chelan Mining Company, et al.*, 16 Wash. (2d) 264, 133 P(2d) 300, states the law of this case in regard to special meeting of the Board of Trustees of the Twisp Mining Company, as follows:

"Appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc. of Corporations, Vol. 2, p. 162, 393, is that, when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states that the rule and the reasons therefor are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here."

And in *Trthewey v. Green River Gorge*, 17 Wash.

(2d) 697, at 727 and 728, 136 P(2d) 1011 and 1012, this Court again said:

> "It is well settled that the power to do particular acts and the general authority to manage the corporate affairs is vested in the trustees or directors, and their acts are binding only when done as a board and at a legal meeting. The law upon the subject is so well stated in 2 Fletcher, Cyclopedia Corporations (Perm. ed.), 392, p. 168 *et seq.*, that we quote therefrom at some length."

And *Bruch v. Nat. Guarantee Credit Corporation* (Del.) 116 Atl. 738, holds:

> "Unless notice be given to each director, as required by the By-Laws of the corporation, the meeting is illegal, and the action taken is not binding."

And John C. Sawbridge on June 15, 1944, swore to an affidavit, which is attached to the "Petition Herein" (page 17), to the following facts, which are not even denied by any of the respondents:

> "Affiant further states that no formal notice was ever sent to him for the special meeting of the Board of Trustees for January 17, 1934, and James O. Cull called affiant by

phone and affiant was present on January 17, 1934, but there was nothing brought before that meeting about John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant. Affiant further states he never signed any Notice for the call of a special meeting of the Board of Trustees for the 30th of January, 1934, and never authorized James O. Cull to mail any notices to anyone for said meeting and affiant further states that nothing was brought up at that meeting of January 30, 1934, about John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant and the name 'John Sawbridge' that appears on the certified copy of those minutes, on Exhibit No. 10, is not the signature of this affiant."

The purported minutes that James O. Cull drafted, as James O. Cull has already admitted, of date of January 17, 1934, corroborate Mr. Sawbridge's affidavit by showing that the purported meeting was held by the consent in writing by John C. Sawbridge, W. V. Coons, C. M. Hull and Harold Simonds, and James O. Cull admits that no notice was ever given to the fifth trustee, Mr. Roy K. Magney, and that Roy K.

Magney was not present and the purported minutes of that meeting shows on its face that no trustee ever approved of those minutes and those purported minutes that James O. Cull prepared does not show that James O. Cull was appointed as "Assistant Secretary" at that meeting, but on the contrary shows that James O. Cull was merely appointed as "*Secretary Pro Tem*" and as a matter of law then James O. Cull was not appointed as "Assistant Secretary" at that meeting and obviously under such a state of affairs. James O. Cull's testimony as heretofore shown herein that he was appointed as "Assistant Secretary" at the January 17, 1934, meeting was false and untrue.

Article II, Section 5, of the By-Laws of the Twisp Mining & Smelting Company, provides:

> "*Special Meetings.* Special meetings of the Board of Trustees shall be held whenever called by the president, or by one-third of the trustees for the time being in office. *The Secretary shall give notice of each special meeting by mail,* the same to be at least two days before the meeting or by telegraph at least one day before the meeting, *to each trustee;* but, such notice may be waived by

any trustee. At any meeting at which every trustee shall be present, even though without notice, any business may be transacted."

It is certain then, that since only four of the claimed Board of Five Trustees, gave any consent to hold a special meeting of the Board of Trustees for January 17, 1934, and no notice was ever given to Roy K. Magney, the fifth trustee, and Roy K. Magney was not present, there was no legal special meeting of the Board of Trustees of the Twisp Company, held on January 17, 1934, and there being no legal meeting, there was as a matter of law no legal resolution passed at that purported meeting.

John C. Sawbridge is corroborated by James O. Cull, in regard to the undisputable fact, that John C. Sawbridge never signed any notice for the call of a special meeting of the Board of Trustees for January 30, 1934, because James O. Cull prepared the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company for January and James O Cull testified as follows:

"Q. Attached to these minutes and proceedings contained in Exhibit 7 is a notice

of the meeting and attached to the notice is a form of the Resolution to be adopted?

A. Yes.

Q. You are familiar with that?

A. Yes.

Q. Did you mail a copy of that notice and resolution to each of those five men whom you have just mentioned as constituting the Board at that time?

A. Yes, I did.

Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

A. Yes." (St. 184)

Preceding the purported minutes that James O. Cull prepared of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30, 1934, which were not approved by any of the trustees present, James O. Cull inserted the "Original Purported Notice" of date of January 19, 1934, for the call of a special meeting of the Board of Trustees of the Twisp Company for January 30, 1934, but that Original never was signed by John C. Sawbridge, as President or at all, the purported signature of John C. Sawbridge was merely type-

written, by James O. Cull, or by someone else at the request of James O. Cull, and attached to that purported "Original" is a purported carbon copy of a Resolution authorizing conveyance of the corporate assets, which is not signed by anyone and attached to that is a purported statement of James O. Cull in the form of an affidavit purporting to claim:

> "That, on the 19th day of January, 1934, on behalf of and at the request of John C. Sawbridge, President of said Company, I mailed to each Trustee of said Company, addressed to each of said trustees, respectively, at his last known mail address, as shown by the books and records of the company, a notice of a special meeting of Trustees, to be held on January 30, 1934, * * *."

But James O. Cull did not swear to those statements. And attached to that purported affidavit there is another carbon copy of the purported notice of date of January 19, 1934, which was mailed to Harold Simonds, with Harold Simonds' signature of date of January 20, 1934.

And then the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company follows, which was pre-

pared by James O. Cull, as a Director of the Board of Directors and Assistant Secretary of the Chelan Mining Company in which James O. Cull falsely states so far as material:

> "A special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, was held at Room 208 Holtzinger Building in the City of Yakima, Washington, on above date (January 30, 1934) at the hour of 2:00 o'clock P. M. *pursuant to notice duly given by the President,* a copy of which is inserted in the Minute Records preceding the Minutes of this meeting."

And said purported minutes further shows:

> "James O. Cull v[illegible] elected as Secretary pro tem of the meet[illegible] and acted.

And on the last page of those purported minutes the following appears:

> "Thereupon, *the Secretary pro tem* reported that Mr. Harold Simonds, the Secretary of the Company, has been absent from Yakima for some time, and that his absence from Yakima will continue for a considerable time in the future; and the question was submitted and considered as to whether an Assistant Secretary should be appointed wi[illegible] authority to act in all ways as Secretary

of the Company during the absence of Mr. Simonds. (Italics ours)

"Thereupon, upon motion duly made, seconded and carried by unanimous vote of all Trustees of the Company, the following Resolution was adopted:

"Whereas, Harold Simonds, Secretary of this Company, has been absent from Yakima, Washington, the place of busines of the Company, for several months; and it is anticipated that said Secretary will continue to be absent for some time; and

"Whereas, for the purpose of executing the instruments referred to in the Resolution just adopted by the Board, and for other purposes incident to the business of the Company, it is desirable that someone at Yakima, Washington, be empowered to act as Assistant Secretary and to execute any and all instruments or papers on behalf of the Company, and to keep the minutes and records of the Company;

"NOW THEREFORE, BE IT RESOLVED, that James O. Cull, of Yakima, Washington, who has heretofore acted, and is now acting, as attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full power and authority to act in all matters pertaining to the Company business, and in keeping its records and executing instruments of conveyance or legal papers of

any kind, the same as a Secretary of the Company might or could do if personally present; all until further order or direction of the Board of Trustees evidenced by entry thereof in the Minute Records of the Company;

"BE IT FURTHER RESOLVED, that specific power and authority are hereby granted to James O. Cull, as Assistant Secretary of the Company, to execute any and all instruments required by the Resolution for transfer of corporate property heretofore adopted at this meeting; and to affix thereto the corporate seal.

"There being no further business to come before the meeting it was, upon motion duly made, seconded and carried, adjourned.

Attest: James O. Cull .....
Secretary Pro Tem." President.

The final proof of the undisputable fact that the purported special meeting of the Board of Trustees of the Twisp Company of January 30, 1934, was not a legal special meeting is found in a letter which James O. Cull, acting in his capacity of a Director on the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company and with absolutely no lawful power or authority to legally mail any notice of the holding of a special meeting of the Board

of Trustees of the Twisp Company and in the absence of any signed notice by John C. Sawbridge, as President of the Twisp Company, which James O. Cull falsely swore existed, as heretofore shown herein, mailed to Roy K. Magney of date of January 24, 1934; which Petitioner was unable to discover until June 5, 1944, which disclosed that James O. Cull never mailed any written notice of the call of the purported special meeting of the Board of Trustees of the Twisp Company to Roy K. Magney, one of the five Trustees of the Board of five Trustees of the Twisp Company, which James O. Cull claimed existed during the month of January, 1934.

This letter, a true copy of which is set forth on pages 6 and 7 of the Petition herein, disclosed the following facts:

> "January 24, 1934.
>
> Mr. Roy K. Magney, 725 United States National Bank Building, Denver, Colo.
>
> My Dear Roy: Greetings. How are you and where have you been all of the time that I haven't heard from you? After our friend Goetz "blew up," and our friend Hottel got interested in mines over at Montana, I despaired of our ever doing anything with the

Twisp; but, fortunately, I think we contacted a live wire in the person of a Mr. Strong, of Portland, who, I believe, is capable of financing the developments of the property, if it shows up properly under rigid examination. Mr. Strong recently made us a proposition, that he would organize a new company to take over the rights (?) which we hold and give the Twisp Mining & Smelting Company a 10% share in all of the capital stock of the new company. If he makes it good, it will be worth something, and if he does not, it will be worth less than at present; so we, here in Yakima, *told him we were ready to go on the proposition. We held an informal meeting here on the* 17th *and adopted a resolution in form as per copy herewith. I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the Trustees, informing him that there are only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds;* there being two vacancies on the Board which resulted in 1932 when Hottel and Julian resigned and we elected Goetz and his friend, MacDonald, of Seattle. Neither of them ever qualified by taking the oath of office, although I wrote each of them two or three times about it. I wish you might be present at this meeting, but, probably, because of distance, and the intangible value of our 'mines' you will not feel justified in tearing away from your business there and making the trip. In any

event, drop me a line; and, if you are willing to join with us in the venture, kindly sign the approval form below the copy of Resolution, if you cannot attend the meeting; and send it in to me, so that I may file it with the other papers. * * *. Sincerely yours,

(Signed) James O. Cull."

(Italics ours)

This Court in *Trethewey v. Green River Gorge*, 17 Wash. (2d) 697, at 727 and 728, 136 P(2d) 1011 and 1012, hold the law of this state is so well stated in 2 Fletcher, Cyclopedia Corporations (Perm. ed.), Sec. 392, p. *et seq.*, that we quote therefrom at some length, and quotes the following part of the law applicable to this instant case to be:

> "It is fundamental that officers of boards can only act as such constituted boards when assembled as such and by deliberate and concerted action dispose of the issue under consideration, and they cannot act in an individual capacity outside of a formal meeting, and a majority of the individuals expression be the action of the board."

Under James O. Cull's own admission in the above written letter that is signed by him and which cannot be disputed, he positively admits

that there was no regularly called special meeting of the Board of Trustees of the Twisp Company held on January 17, 1934, he further admits that it was not a "Formal Meeting," but admits that it was an "Informal Meeting" at which under the law as stated above, which this Court holds is the law governing such a state of affairs, "*that*" no legal resolution of any kind could have been passed at that "Informal Meeting" and of necessity then, the purported resolution that Mr. James O. Cull claims was passed was absolutely null and void from its inception.

Likewise, since John C. Sawbridge maintains under oath in his affidavit attached to the Petition herein, that he never signed any written notice for a call of a special meeting of the Board of Trustees of the Twisp Mining & Smelting Company for January 30, 1934, which affidavit is not even denied by any of the Respondents, it was an absolute impossibility for James O. Cull to mail a "True Copy" of an instrument that never in fact or in law existed to either Roy K. Magney or Harold Simonds and this letter of James O. Cull to Roy K. Magney does not notify Roy K. Magney, when the purported special

meeting of the Board of Trustees of the Twisp Company was to be held and neither Roy K. Magney nor Harold Simonds were present and as a matter of law the purported special meeting of January 30, 1934, was not a regularly called special meeting, but was in fact and in law an absolute "Informal Meeting," at which no legal resolution of any kind could have been legally passed and as a matter of law James O. Cull's testimony that he was legally appointed as the "Assistant Secretary" of the Twisp Mining & Smelting Company is not true, but is absolutely false and untrue.

Further, the purported minutes that James O. Cull, acting in his capacity of one of the Directors of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company prepared, shows on its face that no "Trustee Present" signed or approved same and John C. Sawbridge swears in his affidavit herein that he did not approve the purported minutes and the instrument shows that there is no signature of the President placed on the original and the place where the President should sign is blank. But James O. Cull, knowing those facts, prepared

a certified copy of his purported minutes of date of January 30, 1934, and stated in his certificate as follows:

> "State of Washington)
> County of Yakima) ss.
> THIS CERTIFIES, that the attached and foregoing is a full, true and correct copy of the minutes of a special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, duly and legally held pursuant to notice given as required in the by-laws, on the 30th day of January, 1934, at the office of the company, in the city of Yakima, Yakima County, Washington, which said meeting was attended and participated in by three Trustees of the corporation, to-wit, being the majority in number of all trustees of the corporation; all as appears from the original files and records of said corporation now in my possession. Dated this February 1, 1934. (Signed) James O. Cull, Assistant Secretary of Twisp Mining and Smelting Company."

And Mr. Johnson, of Counsel of the Chelan Mining Company, examined James O. Cull on the trial in Okanogan County, State of Washington, as follows:

> "Q. I would like to identify an exhibit. Will you (Mr. Cull) look at this exhibit,

Chelan Mining Company's Exhibit No. 10, for identification. Look at it and state whether or not that is your signature. That purports to be a certified copy of the special meeting of the Board of Trustees of the Twisp Mining & Smelting Company held January 30, 1934?

A. Yes that includes the minutes.

Q. Were you at that time assistant secretary of the Twisp Mining & Smelting Company?

A. *Yes, I had been so designated on the* 17th.

Q. I will ask you if Exhibit No. 10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, attorney at Portland, at his request?

A. Yes.

Q. That was sent about the same time the deed for that property was sent in?

A. Yes, that undoubtedly was transmitted with the deed.

Mr. Edelstein: Mr. Sawbridge purports to have signed the minutes. John Sawbridge, president, never signed the minutes.

Mr. Cull: I see Mr. Sawbridge's signature is not on the original." (St. 73-74)

And that "Forged" purported minutes that James O. Cull prepared and admits that it was not signed by John Sawbridge, who in fact died September 9, 1931, and which John C. Sawbridge swears in his affidavit attached to the Petition herein is not his signature was uttered by the Chelan Mining Company in the presence of its counsel, Mr. Johnson; and its President, Robert H. Strong; and two of the Directors of its Board of Directors, Mr. Cull and James Cole, who was also one of its counsel and introduced in evidence and admitted in evidence over objections of counsel for the Twisp Mining Company (St. 73 and 74).

It is the law of this land as expressed by the Supreme Court of the United States in *Mooney, Petitioner, v. Holohan, Warden of San Quentin Penitentiary, Respondent*, 294 U. S. 103, 112, 79 L. Ed. 791, 794, in a case where the Attorney General contended, as follows:

> "The Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said

that due process of law is denied.' Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirements of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodied the fundamental conception of justice which lie at the base of our civil and political institutions. Hebert v. Louisiana, 273 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through the deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. *And the action of prosecuting officers on behalf of the State, like that of administrative officers in the exercise of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive*

or administrative officers." (Citing cases) (Italics ours)

"Reasoning from the premises that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, *the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premises.*" (Citing cases) (Italics ours)

Likewise in *Jones v. Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, 338, holds:

"The concept of due process as it becomes crystallized in the public mind and by judicial pronouncement, is formulated in Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406. Its requirements in safeguarding the liberty of the citizen against deprivation through the action of the state embodies those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' referred to in Hebert V. Louisiana, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270. 48 A. L. R. 1102. This requirement cannot be satisfied 'by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court

and jury by presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtainng of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the Mooney case requires no more than the facts of that case require, *and that 'fundamental conception of justice which lies at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.* * * * Considerations of delicacy and propriety need no longer deter amelioration. The appellant is not to be sacrificed upon the altar of a formal legalism too leniently applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional rights may be perceived, and the door to clemency is closed." *Conviction was reversed.* (Italics ours)

This Court in *White v. Donini*, 173 Wash. 34, 21 P(2d) 265, held in a similar case:

> "Two questions are presented by the petition: (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the Petition? and (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has such power is beyond question; under our decisions. Haaga v. Saginaw Logging Co., 170 Wash. 93, 15 P(2d) 655; State ex rel. Cross v. Superior Ct., 158 Wash. 46, 51, 290 Pac. 430; In re Shilshole Avenue, 101 Wash. 135, 1481, 172 Pac. 338. The present writer did not subscribe to the prevailing opinion in the recent Haaga case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not, 'newly discovered,' but 'newly created.' That is, that it was evidence of a condition that had arisen long after trial and judgment, and further, that it was not shown that any fraud had been practiced in securing the verdicts. The case at bar not only falls within the rule in the Haaga case, but also escapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

There can be no distinction made in regards to the requirements in safeguarding the liberty of the citizen against deprivation through the action of the state, under the provisions of the Fourteenth Amendment to the Constitution of the United States, from the requirements of the Fourteenth Amendment in safeguarding the property of the citizen against deprivation though the action of persons by the knowing use of perjured testimony to illegally obtain the property of another without due process of law as was manifestly done in this instant case.

In *McClutchy v. Superior Court* (Cal.) 51 Pac. 696, the court in a case where the court refused to hear McClutchy held:

> "It is contended by respondent that, even if the action of the court was wrong, it was error merely, which cannot be reviewed on certiorari; that the court having jurisdiction of the person and subject-matter, the method in which it exercised such jurisdiction cannot be inquired into in this proceedings, which looks only to the question of the jurisdiction. If the premises were correct, the conclusions would undoubtedly follow. But with the view that the action involved no more than mere error we cannot coincide. It was a trangression of the fundamental right

guaranteed to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury."

NOTWITHSTANDING THE UNDISPUTABLE FACTS, AS HERETOFORE CLEARLY SHOWN HEREIN THAT THE PURPORTED SPECIAL MEETINGS OF THE BOARD OF TRUSTEES OF THE TWISP COMPANY OF DATE OF JANUARY 17 AND 30, 1934, WERE NOT REGULARLY CALLED AND WERE NOT LEGALLY HELD, THE "DEPARTMENT" IN IT OPINION AT PAGE 289, ASSUMED WITHOUT EVIDENCE TO SUPPORT THOSE ASSUMPTIONS, AS FOLLOWS:

1. "The meeting of January 17 and 30, 1934, were regularly called special meetings * * *."

2. The Department further assumed in regard to the purported special meeting of the Board of Trustees of date of January 17, 1934, that, "The directors met as a board, and a quorum of the directors then in office being present, proceeded as a board to transact the business of the corporation, referred to in the notice given of such meeting." (St. 289-290) In face of the fact as the evidence shows, as heretofore quoted herein, that James O. Cull, a director of the Board of Directors and one of the Assistant Secretaries of the Chelan Mining Company, admits that he *"Didn't send out*

formal notices for the January 17 meeting."
(St. 52)

And James O. Cull further admits in writing in the letter he wrote to Roy K. Magney of date of January 24, 1934, heretofore quoted on pages 13 and 14, herein:

> "We held an informal meeting on the 17th and adopted a resolution in form as per copy herewith."

The Department further contends (Opinion pp. 278, 279):

> "Mr. Strong was present at this meeting, with his attorney, Mr. Cole. Mr. Strong submitted his proposition to the board, and after discussion a resolution was passed, accepting Mr. Strong's offer."

When the Department on page 289 of its Opinion under the authority there cited, no legal resolution could be passed at an "Informal Meeting" as a matter of law.

3. The Department further contends (Opinion pp. 279, 280):

> "A notice of the meeting of January 30, 1934, signed by John C. Sawbridge, as presi-

> dent, dated January 19, 1934, to which was attached a copy of the resolution passed at the January 17 meeting, was mailed to each of the five directors, at his last known address, on January 19, 1934, as appears from the affidavit of James O. Cull."

When no such affidavit exists in this record and John C. Sawbridge's affidavit (Petition pp. 16, 17 and 18), shows that he never signed any notice for the call of the special meeting of date of January 30, 1934, and no such notice signed by John C. Sawbridge appears in this record at any place and no such notice was mailed to Roy K. Magney.

4. The Department further contends (Opinion p. 281):

> "It was pursuant to this resolution that Mr. John Sawbridge (meaning John C. Sawbridge), as president, and Mr. James Cull, as assistant secretary, executed and delivered to Mr. Strong the deed of January 31, 1934, here in question." (Meaning the purported resolution claimed to have been passed at the January 17, 1934, informal meeting).

Which void resolution gave neither John C. Sawbridge nor James O. Cull any power or legal

authority to execute that deed as officers of the Twisp Mining & Smelting Company.

5. The Department further contended (Opinion p. 281):

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and, after the conveyance by Mr. Strong and wife to Chelan Mining Company, that company issued to Twisp 250,000 shares of its stock, which was delivered to Mr. Cull and *receipted for by him. Twisp still holds this stock.*" (Italics ours)

However, the record shows that "James O. Cull" was one of the Assistant Secretaries of the Chelan Mining Company when he received that certificate for 250,000 shares of stock of the Chelan Mining Company and that he never was the "Assistant Secretary of the Twisp Company" as already shown heretobefore herein, and James O. Cull testified as follows:

> "Q. Did you ever inform either of the Magneys of the receipt of the shares of stock in the Chelan Mining Company? Did you inform the Magneys that you had that certificate?
>
> A. I couldn't say specifically they knew that I had it." (St. 51, 52)

"Q. Mr. Cull, sometime in May, 1939, I think you testified, or in April, I am not sure of the date, you turned over to Mr. Blaesser the minutes (Exhibit No. 7) introduced in evidence?" (St. 55)

"A. Yes, April 5, 1939, I had with me these minutes and took them to the meeting. I have forgotten whether I left them with Mr. Blaesser at that time or whether he called at the office later and picked them up. He became the succeeding secretary. I turned these (minutes) over to him and I told him and one of the Magneys at the meeting that I had the 250,000 shares of stock and Mr. Blaesser informed me at the time he didn't know whether they wanted to take it at the time and they would inform me later on, so I continued to hold the stock, and later on I got the information or idea that they didn't want to accept it so I just continued to hold the stock.

Mr. Johnson: Q. That Certificate of Stock that we are talking about is 250,000 shares of stock in the Chelan Mining Company?

A. Yes.

Q. That was the consideration which is mentioned in the Resolution for the deed?

A. For the transfer of the property rights from the Twisp Mining & Smelting Company to the Chelan Mining Co." (St. 55, 56)

6. The Department contends (Opinion p. 293):

> "Some contention is made that Mr. Sawbridge was not president of Twisp at the time the deed of January 31 was executed, but that Mr. Goetz was president. We have heretofore held that Mr. Goetz never became a trustee of Twisp, and therefore never became president. Mr. Sawbridge, who had been president prior to August 15, 1932, continued to act as president, without objection, and was at least a de facto officer, if not a de jure officer."

However, John C. Sawbridge, in his affidavit attached to the Petition herein on pages 16 and 17, swears under oath and same is not denied, as follows:

> "That he is the person who presided over the special meeting of the Board of Trustees held on August 15, 1932, and that at that meeting affiant resigned as 'President' of the Twisp Mining & Smelting Company and Goetz was elected as 'President' in affiant's place and affiant understood at that meeting that he no longer was the 'President'."

The law as stated by this Court in *Matson v. Johnson*, 174 Wash. 12, 24 P(2d) 592, is:

> "It is firmly established that the acts of a de facto officer will bind the corporation and

all business relations with it; and conceding the theory of the plaintiff that the corporation in this instant case could act only through a majority of the board, and that a majority of the board only acted in the election or appointment of the subsequent trustees, we think the subsequent action of the trustees were valid for the reason that the trustees elected were de facto trustees, and, that being so, it is not necessary to discuss the question as to whether they were de jure trustees." Citing Baggot v. Turney, 21 Wash. 339, as authority, where this court held: "Such officers (that is de facto officers) are distinguished from mere usurpers, and in State v. Curtis, 9 Nev. 325, the court held: 'In order to make a person an officer de facto, he should in some way have been put in office, and have secured such a holding thereof to be in peaceful possession of an office. In the case at bar there was no forcible entry into the office by these elected trustees. They secured peaceful possession of the office by color of right; that is, by the action of all the available trustees of the corporation. It does not seem that it was forcibly or clandestinely done, and no objection was made to their entry into office by any one interested or disinterested and it seems to us they can be plainly distinguished from mere usurpers, whose action would not be binding upon the corporation or any one else.'"

In this instant case, according to the affidavit of K. H. Blaesser, Secretary of the Twisp Company, attached to the Petition herein on pages 20 to 40, James O. Cull turned over to Mr. Blaesser on April 5, 1939, the records of the Twisp Company that were contained in Exhibit No. 7, and advised Mr. Blaesser that constitutes all the records in his possession and that there was no correspondence or documentary evidence in his possession. However, on March 21, 1944, a stockholder of the Twisp Company visited James O. Cull in his office at Yakima, Washington, for the purpose of obtaining the address of Frederick C. MacDonald and while there discovered that James O. Cull had concealed important correspondence and other documentary evidence and James O. Cull agreed to find said concealed matter and forward same to K. H. Blaesser and on April 28, 1944, that concealed matter was received by K. H. Blaesser by express and true copies of that portion of said concealed matter is set forth in K. H. Blaesser's affidavit and on April 28, 1944, is the first time that the Twisp Company had knowledge such evidence existed and on

pages 24 to 40 of that affidavit it is disclosed that John Goetz, was duly elected as the "President" of the Twisp Company on August 15, 1932, and that he was duly ordered by the Board of Trustees to transact the business then under consideration of the Twisp Company and that John Goetz did transact that business and did duly qualify at least as a "De Facto President," if not a "De Jure President" and further established that James O. Cull's testimony to the contrary was false and untrue and John C. Sawbridge never was reelected as the President of the Twisp Company after August 15. 1932, and there was no legal meeting of the Twisp Company or its Board of Trustees held after August 15, 1932. for the reason, as heretofore shown herein, the purported special meetings of the Board of Trustees of January 17 and 30, 1934, were only "Informal Meetings" where no one present could legally act as an officer of the Twisp Company and John C. Sawbridge had no legal authority to do any official act in the premises by virtue of the void purported meetings of January 17 and 30, 1934.

7. Section 3803-31, paragraph 1 of Reming-

ton's Revised Statutes (Supp.) of the Uniform Business Corporation Act of 1933, provides:

> "* * * A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And Article II, Section 1 of the By-Laws of the Twisp Company in regards to the term of office of Trustees, provides:

> "and trustees shall hold office for one year and until their successors are elected and qualified."

And the Department in this instant case denied the Twisp Company equal protection of law in holding that since John B. Hottel and Charles W. Julian resigned as Trustees on August 15, 1932, and John Goetz and Frederick C. MacDonald were elected in their place as Trustees, and since James O. Cull, one of the Assistant Secretaries of the Chelan Mining Company claimed neither Mr. Goetz nor Mr. MacDonald never qualified that there were two vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934, for the obvious reason that in law John B. Hottel and

Charles W. Julian remained as trustees until their successors were duly elected and duly qualified as a matter of stautory law, which the Department had no power or authority to hold otherwise and therefore as a matter of law there were no vacancies on the Board of Seven Trustees of the Twisp Company during the month of January, 1934.

8. Section 3803-36 of Remington's Revised Statutes (Supp.) of the Uniform Business Corporation Act of 1933, provides:

> "1. A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign. 2. * * * If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors."

In *Enright, as Trustee in Bankruptcy, v. Heckscher,* 240 Fed. (2d) (C. C. A.) 963 at 865 and 872, passed on a similar statutory situation and held:

> "The object of the Syndicate, a corporation, was to purchase, acquire, or lease mines or mineral lands of every kind. Law pro-

vided when a stockholder received stock from a corporation as fully paid, for which he gave less than par, he is liable for interest, as damages for the retention of the money, on the balance of the par value of the stock from the time payment for the stock is due. Trial court held in substance that the whole spirit and policy of the act was so clearly opposed to any arrangement by which corporation stock shall issue without receipt by the company of an equivalent in value to its par that any arrangement to this effect must be void, as contrary to public policy of the law. Volney v. Dixon (N. J. Eq.) 60 Atl. 189, and further held: It seems from the minutes that there were five directors present, but Mr. Munford was interested in the transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four directors present, and nine were required, *it seems clear there would have been no meeting at the time the action was taken, therefore there would be no finding by the directors, as required by section 49 of the corporation Act or law, that the value of the property transferred was equal to the value of the stock issued. The resolution was a nullity.*" (Italics ours)

In this instant case, as already shown herein, there was no formal notice of the call of the purported special meeting of the Board of Trustees of the Twisp Company for the purported special meeting of the Board of Trustees for the holding of such a meeting on either January 17 or January 30, 1934, ever issued by one who had any legal authority to issue a formal notice for the holding of a special meeting and there never were any formal notice mailed to Roy K. Magney, one of the trustees of the so-called Board of Five Trustees or to John B. Hottel or Charles W. Julian, who still held the office of a trustee until their successors were duly elected and qualified and of necessity then there were no special meetings of the Board of Trustees of the Twisp Company held on either January 17, 1934, or January 30, 1934, as a matter of law and the purported resolutions that appear in the purported minutes of those purported meetings that were prepared by James O. Cull as Secretary Pro Tem of the Twisp Company and as one of the Assistant Secretaries of the Chelan Mining Company, which were never approved by any of the trustees present were absolutely null and void from their in-

ception and there never was any legal finding of the fact that there were obligations of the Twisp Mining & Smelting Company, which the corporation or its stockholders were unable to meet then matured and under the above case there never was any legal power or authority vested in the three trustees present at either of the purported meetings to dispose of all of the assets of the Twisp Mining & &Smelting Company and the Chelan Mining Company having acted in said pretended transaction by its authorized "Assistat Secretary" James O. Cull, was charged with the knowledge of James O. Cull as a matter of law.

9. The Department further contends (Opinion 271 and 272):

> "In regard to the Executory Sale Contract of date of November 23, 1927, wherein the Alder Group Mining & Smelting Company, sold the three Patented Mining Claims to John L. Magney, which contract was duly assigned to the Twisp Mining & Smelting Company, by messne assignments which were duly filed for record on June 27, 1932, with the Auditor of Okanogan County, State of Washington, that Mr. Morrill testified as follows:

"'Mr. Morrill testified that on January 19, 1932, a notice of forfeiture was served on John L. Magney, the Alder Development Company, to which Mr. Magney had assigned his contract with the Alder Group, and also on the Alder Metals Corporation, a holding company for Alder Development Company. On August 24, 1932, Mr. Morrill brought an action in Spokane County, to cancel the Magney contract. * * * Mr. Morrill stated that, at the time he started the above action, there was nothing of record showing that Twisp has or claimed any interest in the property.'"

And Mr. Morrill, being examined by counsel for the Methow Gold Corporation, identified Exhibit No. 44, as a certified copy of the court records of the purported action in Spokane County, State of Washington, that Mr. Morrill claimed cancelled the Executory Sale Contract of date of November 23, 1927, and the Court admitted Exhibit No. 44, in evidence (St. 256).

Mr. Gillespie: "Q. At the time you (Mr. Morrill) commenced this action, did you ever hear or know that the Twisp Mining & Smelting had any interest or claimed to have any interest, or that the contract had been assigned?

A. I may have heard about the Twisp. I

wouldn't be sure, but I know very well there was no record of anything of the Twisp or anything to show that they held it." (St. 257)

And Exhibit No. 44 shows that the action was brought by the Alder Group Mining & Smelting Company as "Plaintiffs" and that the "Plaintiff" did not allege that it had paid its license fee last due the State of Washington and under the law as stated by this court in *National Grocery Co. v. Fur Trading Co.*, 3 Wash. (2d) 288, 100 P(2d) 408, is:

> "That under the provisions of section 2842 of Rem. Rev. Statutes of 1932, no corporation shall be permitted to commence or maintain any suit or proceedings in any court of this State, without alleging and proving it had paid its last license fees last due."

It is plain, therefore, that there was no plaintiff in the above purported action and the Twisp Company was not made a party and under the authority of *Patterson v. Ford* 167 Wash. 121, 8 P(2d) 1006, no judgment could have been rendered against the Twisp Company and it now appears in the "Petition" herein that Mr. Morrill

has notice of the assignment to the Twisp Company, as early as January 10, 1931, and was actively engaged in negotiations with John Sawbridge, the President of the Twisp Company pertaining to the operation of the property under the assignment of the Executory Sale Contract, and it is manifest that Mr. Morrill's testimony to the contrary was false and untrue.

As held in *Jones v. Commonwealth of Kentucky*, 97 Fed. (2d) (6th C. C. A.) 335, 338, *supra*:

> "The 'fundamental conception of justice which lies at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty convictions upon perjured testimony if later, but fortunately not too late, its falseness is discovered, if constitutional rights are not to be impaired, and that rule applied equally to purported judgments in civil cases that are procured by the knowing use of perjured testimony, as heretofore shown was done in this instant case."

10. The Department further contends (Opinion p. 270):

> "It may be stated that this case was not presented to this court by the same counsel

who tried the case for appellant * * *. We make this statement for the reason that counsel for appellant in this court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made or presented to the trial court; in fact, no contention was made in the lawer court that the then directors of appellant, or Mr. Strong, or the Chelan Mining Company, acted other than in good faith. * * * We therefore cannot consider the claim now made in this court that he deed was a forgery."

The Department manifestly based the above statement on the false Statement of the Receiver's Counsel, coupled with the false statement of the Methow Gold Corporation's Counsel, which are set forth on page 12 of the Petition herein and the Department in making its statement failed to observe the Memorandum of the Trial Court in regard to the theory of the Twisp Company's case in the lower court, which is set forth on page 12 of the Petition, which as stated by the Trial Judge was as follows:

"It is plain from the allegations of the plaintiff's complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the

plaintiff in January, 1934, were wholly without authority and did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents and managing officers of the Chelan Mining Company—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant Chelan Mining Company. * * * This being the situation I must look upon the complaint as being a single purpose effect to set up the invalidity in the conveyance on the sole grounds that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company, the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired." (St. 341, 342)

It is further alleged in the Petition herein, that the question of the "Forged Deed" was raised in

a brief to the Trial Court, which was served on each of the Respondents and each of their counsels accepted service of said brief and it was argued to the Trial Court by Tracy E. Griffin, one of the original counsel for the Twisp Company in this litigation and those allegations are not even denied by any of the appellees in this proceedings. (See Petition pp. 19 and 20)

It has been positively shown herein, that there was no legal special meeting of the Board of Trustees of the Twisp Company held on either January 17, 1934, or January 30, 1934, and being no legal special meeting held on those dates there never was any legal resolution passed at either purported meeting and of necessity then as a matter of law there never was any legal authority given to either John C. Sawbridge of James O. Cull, to execute any deed of transfer of the Twisp Company's assets, in the name on the Twisp Mining & Smelting Company on January 31, 1934.

In *Hotaling v. Hotaling* (Cal.) 224 Pac. 435, that question was squarely passed upon and the court held:

"The deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the sole power to give such authorization."

Neither a bona fide President nor a bona fide Secretary has any legal authority to execute any instrument of transfer of all the assets of a corporation unless specific power and authority is given them by the stockholders or the Board of Trustees to do so and since no such authority was ever given either John C. Sawbridge or James O. Cull, who were neither the President or Assistant Secretary of Twisp Company, their acts in so attempting to transfer all the assets of the Twisp Company to the Chelan Mining Company constitutes an absolute forgery under the provisions of Section 2586 of Rem. Rev. Statutes and the Department that refused to hear or consider that phase of this cause not only committed error, but its action was not merely error but was a denial of the Twisp Company's Constitutional rights to be protected from the confisca-

tion of its real property and real property rights without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States and the United States Supreme Court in *Chambers v. Florida,* 309 U. S. 227, 241, 84 L. Ed. 716, 724, holds:

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our constitution."

And that rule applied with equal force to this instant case, because the Fourteenth Amendment not only protects one from being convicted of a purported crime without due process of law, but equally protects the stockholders of a corporation from being deprived of their interests in real property and real property rights without due process of law.

And in *Jones v. Commonwealth of Kentucky,* 97 Fed. (2d) (6th C. C. A.) 335, *supra,* under the

authority of the *Mooney v. Holohan* case, holds that the state is required to afford a corrective judicial process to remedy the alleged wrong and the State has furnished a remedy in providing that the injured party may apply to this Court for permission to present a Motion for a new trial to the lower court or a Motion to re-open the case for additional evidence and it is the duty of this Court to grant such permission upon the showing herein set forth and thereby protect the stockholders of the Twisp Mining & Smelting Company from being deprived of their interest in real property and real property rights without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

And to that end this Petition for rehearing should be granted and this matter be heard before the entire court En Banc before the stockholders of the Twisp Mining & Smelting Company are deprived of their interest in real property and real property rights by the knowing use or perjured testimony that was used in this cause

to obtain the judgment of the lower court and the affirmance of same by this Court.

Respectfully submitted,

JOSEPH F. MORTON,
Attorney for Petitioner.

APPENDIX "A"

This action was originally brought in the Superior Court of the State of Washington, for the County of Okanogan, by the Twisp Mining & Smelting Company, a Washington corporation, to quiet the title in itself, to valuable mining property in Okanogan County, State of Washington, and for the purpose of obtaining a decree declaring the following instruments null and void and of no force and effect, to-wit:

"A deed, dated January 31, 1934, (Ex. 20) (St. 133) executed in the name of plaintiff, purporting to convey to Robert H. Strong the mining property involved in this case;

A deed from Robert H. Strong and wife to Chelan Mining Company, (Ex. 21) (St. 133 and 325) purporting to convey the same property to the Chelan Mining Company, that is purporting to convey all the rights, titles and interest of Robert H. Strong and wife that Robert H. Strong obtained by virtue of the purported deed from the Twisp Mining & Smelting Company of date of January 31, 1934, (Ex. 20).

A deed from the Chelan Mining Company to Robert S. Lewis and Fred B. Morrill, as surviving trustees of the Alder Group Mining & Smelting Company of date of January 17, 1939, (Ex. 21-A) (St. 133, 134) purporting to convey to said surviving trustees all the rights, title and interest that the Chelan Mining Company had in the same property.

A contract of date of January 23, 1939, between the Chelan Mining Company, as vendor to Robert H. Lewis and Fred B. Morrill, surviving trustees of the Alder Group Mining & Smelting Company, as vendee and a lease from Robert H. Lewis and Fred B. Morrill, surviving trustees of the Alder Group Mining & Smelting Company, as lessors to Mahlon McCain and Charles W. Gillespie, of date of January 23, 1939, (Ex. 12) (St. 116) an assignment of such lease, dated February 21, 1939 (Ex. 15) (St. 117) from Mahlon McCain and Charles W. Gillespie to the Methow Gold Corporation,

a Washington corporation, purporting to enter into an illegal contract and lease, for the unlawful purpose of entering into New Business on behalf of the Alder Group Mining & Smelting Company, a defunct corporation which said surviving trustees had no legal right to do."

The "Theory" of the "Appellant's" case from the start of this action was that the purported "Deed" that was made in the name of the Twisp Mining & Smelting Company on January 31, 1934, (Exhibit 20, herein) was made by John C. Sawbridge as "President" and James O. Cull, as "Assistant Secretary", when either of those gentlemen were the "President" or the "Assistant Secretary" of the Twisp Mining & Smelting Company, and further that neither of said gentlemen were ever legally authorized to execute such a deed, whether the Board of Trustees was a Board of Five Trustees or a Board of Seven Trustees as a matter of law.

The Hutchinson Realty Company v. Hutchinson, 136 Wash. 184, 239 Pac. 388, the Court held:

> "This action was commenced in the Superior Court by the plaintiff, Hutchinson Realty Company, against the defendant, Josephine Hutchinson, seeking recovery of certain real property and the quieting of its title thereto by the removal of clouds thereon in the form of deeds of conveyance purported to have been executed without authority by its "President" so pretending to execute them, all of which was well known to her at the time of receiving the deeds. A trial in the Superior Court resulted in findings and judgment in favor of the plaintiff quieting its title as prayed for, from which the defendant."

The State Supreme Court, contended in this instant case:

> "Some contention is made that Mr. Sawbridge was not the president of Twisp at the time the deed of January 31st was executed, but Mr. Goetz was president. We have heretofore held that Mr. Goetz never became a trustee of Twisp, and therefore never became

president. Mr. Sawbridge who had been president prior to August 15, 1932, continued to act as president, without objection, and was at least a defacto officer, if not a dejure officer." (See Court's opinion in 16 Wash. (2d) 264, page 293, 133 Pac. (2d) 300, 312).

The evidence on the trial of this case, as testified to by James O. Cull, was:

> "Q. Did you have a formal meeting (Of the Board of Trustees of the Twisp Mining & Smelting Company) which required the sending out of formal notices between the 15th of August, 1932, and the 30th of January, 1934? A. No." (St. 27)

There being no "Formal Meetings" of the Board of Trustees of the Twisp Mining & Smelting Company, which will hereafter be referred to as the Twisp Company, after August 15, 1932, when John C. Sawbridge resigned as president and John Goetz was elected as president in John C. Sawbridge's place, and John Goetz was duly authorized by a valid resolution of the Board of Trustees of the Twisp Company at the regular special meeting of the Board of Trustees of date of August 15, 1932, to proceed with the business of the Twisp Company and did proceed, as discovered from James C. Cull's letters that were produced by James C. Cull on April 4, 1944, which are attached to the Twisp Company's Petition to the State Supreme Court for leave to apply to the Superior Court of Okanogan County, State of Washington, for relief as prayed for in said Petition that was filed with the State Supreme Court on June 23, 1944. John C. Sawbridge ceased to be the president of the Twisp Company and John Goetz became the "De Facto President", if not the "De Jurs President" of the Twisp Company and John C. Sawbridge had no lawful power to do any legal act of any kind on behalf of the Twisp Company, as the President of the Twisp Company under the rule states in Matson v. Johnson, 174 Wash. 12, 24 Pac. (2d) 592, as expressed in Baggot v. Turner, 21 Wash. 339, 344, 58 Pac. 212, to-wit:

> "Such officers (that is defacto officers) are distinguished from mere usurpers, and in State v. Custis,

9 Nev. 325, the Court held: 'In order to make a person an officer de facto, he should in some way have been put in office, and have secured such a holding thereof to be in peaceful possession and actually exercising the function of an officer. In the case at bar, there was no forcible entry into the office by these elected trustees. They secured peaceful possession of the office by color or right; that is, by the action of all the available trustees of the corporation. It does not seem that it was forcibly or clandestinely done, and no objection was made by anyone interested or distinterested and it seems to us they can be plainly distinguished from mere usurpers, whose action would not be binding upon the corporation or anyone else."

And further, even if John C. Sawbridge was the "president" and "James C. Cull" was the "Assistant Secretary" before they could legally execute any deed which purported to transfer all the assets of the Twisp Mining & Smelting Company to Robert H. Strong they were required to obtain authority for doing so from the Board of Trustees of the Twisp Mining & Smelting Company and before the Board of Trustees of the Twisp Mining & Smelting Company had any power or authority to give John C. Sawbridge and James O. Cull that authority, there would have to be a legal notice mailed to each of the five trustees of the Board of Five Trustees of the Twisp Mining & Smelting Company of the holding of a special meeting of the Board of Trustees on January 30, 1934, and since as now shown, there was no notice of the holding of that purported special meeting of the Board of Trustees of January 17 or January 30, 1934, ever mailed to Roy K. Magney and he not being present at either of said purported meetings, there was as a matter of law no legal meeting held on either date and there never was any legal authority given to John C. Sawbridge or James O. Cull to execute any deed of transfer of all the assets of the Twisp Mining & Smelting Company and under the provisions of Section 2586 of Rem. Rev. Statutes of the State of Washington, which provides:

"The false making or forging of any instrument or writing purporting to have been issued by or in behalf

of a corporation * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, * * *, is forgery in the same degree as if that person were in truth an officer or agent of such corporation."

In State v. Fay (Minn.), 83 N. W. 158, the Court held:

"Check was signed "P. McDonnell, by John McDonnell" held to be forgery. The writing alleged to be forged purports on its face to have been executed by P. McDonnell by John McDonnell. Hence it appears on the face of the instrument that, if it was genuine, it would possess legal efficacy as an order of P. McDonnell for the payment of money. Therefore a representation that the instrument was genuine includes the representation that John McDonnell was authorized to execute it for P. McDonnell. Now, when the defendant uttered the instrument as true, knowing it to be forged, he thereby represented and affirmed that the agent purporting to execute it for his principal had authority to do so. He is bound by his own representations, and it is not necessary to allege in the indictment or prove on the trial such agency. Were it otherwise, all that it would be necessary for the party putting off forged paper to do in order to escape conviction would be to deal in such paper only as purported on its face to be executed by an agent for his principal, but *who had no authority to represent the principal in any case.*" (Italics ours)

In Commonwealth v. Wilson (Ky.), 12 S. W. 264, cites Bishop's Criminal Law, Vol. 2, Sec. 585, as authority on the subject of one signing his own name, and still committing forgery where it was said:

"Plainly the broad doctrine is not maintainable that it is incompetent for a man to commit forgery of an instrument executed by himself" and if it is forgery in the case referred to, when the deed was executed by the accused person, it clearly must be so regarded in this

case. For not only was the plat and certificate, as charged fraudulent, but, though made by the accused person, purporting to be not his individual, but official, act as surveyor, wherein the writing was false and deceptive, and where only would it have possessed legal efficacy if genuine and authentic."

In Almo Trust Company v. Cunningham (Tex.), 203 S. W. 413, 414, it was held on the question of a forged deed:

> "The forged deed could not affect the title to the land, and was not therefore entitled to record. The provisions of the statutes as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed. * * *. *When the deed that was recorded in Cameron County which purports to be the deed of W. C. Scott and wife was attacked by an affidavit of forgery the burden rested upon the appellant to show that it was a genuine instrument.*" (Italics ours)

That same rule is the rule of the State of Washington, as stated in Lewis v. Kuyawa, 158 Wash. 607, 291 Pac. 1105, to-wit:

> "It is unquestionable the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parted with in reliance on the genuineness of the instrument, cannot claim protection against the title of the rightful owner. As some courts have said, it would be monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

In Kline v. Mueller (Okl.), 276 Pac. 200, 206, the court held:

> "A forged deed is void, and the same, though recorded in due form is ineffective as a muniment of title, even as to subsequent purchasers in good faith, without notice."

In Abee v. Garges (Tex.), 65 S. W. 489, the court held:

> "The grantee in a quitclaim deed, even though for value and without notice, takes the risk of the genuineness of each and every deed in the line of the grantee's title."

In this instant case, the Chelan Mining Company, a corporation, the Methow Gold Corporation, a corporation and this Receiver, all claims their respective rights to the property and property rights involved in this instant case, by virtue of the purported forged quitclaim deed of date of January 31, 1934, Exhibit No. 20, herein and by their own fraud that was practiced on the State Supreme Court, to-wit, their false claim that the question of the "Forged Deed" was not raised in the lower court, they succeeded in preventing the State Supreme Court from passing on that vital legal issue in this instant case and since their fraud has now been discovered and shown to, the Appellant is certainly entitled to have the case re-opened and be allowed to file its petition with the Superior Court of Okanogan County, State of Washington for a new trial, or in the alternate its petition to reopen the case for additional evidence that has now been discovered and protect the stockholders of the Twisp Mining & Smelting Company from being deprived of their share of the property and property rights of the Twisp Mining & Smelting Company without due process of law by reason of a forged quitclaim deed.

The Twisp Mining & Smelting Company Obtained Its Title as Follows:

On November 23, 1927, the Alder Group Mining & Smelting Company entered into an Executory Sale Contract of

Three Patented Mining Claims, as vendor, with John L. Magney as vendee (Exhibit No. 4), which it had a legal right to do under the authority of Patterson v. Ford, et ux, 167 Wash. 121, 8 Pac. (2d), and John L. Magney, duly filed said Exhibit No. 4 with the Auditor of Okanogan County, State of Washington, on June 27, 1932, and the Chelan Mining Company, the Receiver, and Methow Gold Corporation took whatever rights they claim to have in the property and property rights of the Twisp Mining & Smelting Company with constructive notice that required them to ascertain the true situation of the method adopted by the Chelan Mining Company in illegally attempting to obtain the rights of the Twisp Mining & Smelting Company in said property and property rights, and none of them were innocent purchasers as a matter of law.

On January 30, 1934, James O. Cull was one of the directors of the Board of Directors of the Chelan Mining Company, and one of its Assistant Secretaries and Local Agents in Washington and 19 C. J. S. 477, Section 1006, provides:

> "A corporate officer or agent, however, cannot without the corporation's knowledge and consent, represent it in a transaction with another which has opposite interests, and in which he is interested as director or other officer."

And 23 R. C. L. 70, 71, further provides:

> "He (Receiver) should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should as far as possible, see to it that each has an equal opportunity to enforce his claim."

Nevertheless, James O. Cull, illegally represented the Chelan Mining Company and the Twisp Mining & Smelting Company in the purported transaction of the purported sale of the Twisp Mining & Smelting Company on January 30, 1934, to the Chelan Mining Company. He claims that he had the Twisp Mining & Smelting Company's permission

to so act, but no legal trustees meeting was held by the Board of Trustees of the Twisp Mining & Smelting Company after August 15, 1932, according to Mr. Cull's own testimony, to-wit:

> "Q. Did you have a formal meeting which required the sending out of formal notices between the 15th of August, 1932, and the 30th of January, 1934? A. No."

No consent of that nature could legally be obtained from the Board of Trustees, of the Twisp Company unless it was obtained at a "Regularly Called Formal Special Meeting of the Board of Trustees, for that purpose, and there never was such a meeting held after August 15, 1932, and consequently James O. Cull never was given any legal consent of the Twisp Company to represent both the Twisp Company and his own corporation, the Chelan Mining Company, on either January 17th or January 30th, 1934, and further since no written notice of the holding of a special meeting of the Board of Trustees of the Twisp Mining Company for either January 17th or January 30th, 1934, for any purpose whatsoever, was given to Roy K. Magney, one of the members of the Board of Trustees, whether it be a Board of Five Trustees or a Board of Seven Trustees, as required, must be done to hold any special meeting of the Board of Trustees by Article II, Section 5 of the By-Laws of the Twisp Company and Roy K. Magney was not present at either of the purported special meetings, no legal resolution could legally be passed at either of said purported special informal gatherings of some of the Board of Trustees that was illegally attempted to be held on January 17th and January 30th, 1934, as held in Bruch v. National Credit Corporation (Del.) 116 Atl. 738, was null and void, to-wit:

> "Unless notice be given to each director, as required by the By-laws of the corporation, the meeting is illegal, and the action taken is not binding."

The Twisp Company's action in the Trial Court, Case No. 10158, as held by the Trial Court, in passing of the defendant's demurrers to the Twisp Company's complaint,

defined the nature of the Twisp Company's complaint, was:

> "It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the action of the Trustees of the plaintiff in January, 1934, *were wholly without authority and therefore did not bind the plaintiff corporation, and the illegal character of the performance was known to the officers and agent of the Chelan Mining Company,* in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the Chelan Mining Company. * * *. *This being the situation I must look upon the complaint as being a single purpose effort to set up invalidity in the conveyance attacked on the sole grounds that it was consummated without any authority and was not binding on the Twisp Mining and Smelting Company, the plaintiff herein,* and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company sided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpretations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalid and unwholly character of the color of title which it acquired." (St. 341, 342) (Italics Ours).

Counsel for the Receiver and Counsel for the Methow Gold Corporation, Appellees herein and Counsel for the Respondents in the State Supreme Court falsely stated to the State Supreme Court in their briefs on that appeal, as follows:

> Receiver's claim was: "In view of a very peculiar position by substitute counsel for appellant in their opening brief in injecting the suggestion about a "FORGED DEED", it may be proper to point out that up to the time the brief was served, there had never been

a charge of fraud, misconduct or intentional improper act on the part of any trustee or officer of the Twisp Mining & Smelting Company, *or on behalf of any other party to the litigation.* The complaint was drawn and the case tried solely on the theory that the lack of quorum rendered the proceedings void as a matter of law. *Certainly the court will not permit the injection of any such claim into the case on appeal.* (Italics Ours).

The Methow Gold Corporation falsely claimed: "In reply to the charge of forgery set forth in the briefs submitted by Appellant, we are prone to believe that that is the brain child of W. B. Mitchell, the clerk employed by Attorney W. G. Boland. There is no mention of forgery in the trial court and no argument about forgery before the trial court. Consequently, Judge Brown, the Trial Judge, would be surprised to learn there was an allegation of forgery in this case."

And by reason of those false statements of counsel for the Appellees, the State Supreme Court in its Opinion at Page 270 of the Official Printed Opinion, in 16 Wash. (2d) 264, 133 Pac. (2d) 300, held:

"It may be stated that this case was not presented to this court by the same counsel who tried the case for the Appellant and we assume that the briefs were not prepared by counsel who tried the case. We make that statement for the reason that counsel on behalf of Appellant in this court makes some claim that the deed executed on behalf of Appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower court that the then directors of Appellant, *or Strong, or the Chelan Mining Company,* acted other than in good faith. *The case was tried by Appellant purely upon the theory that there was no quorum of the directors present on January 17th, or January 30th, 1934, authorized to pass the resolution and that therefore the resolution passed on January 17th, and adopted on January 30th, was null and void.* We therefore cannot consider the claim now made in this court that the deed was a forgery." (Italics Ours).

In the *first place*, the Rules of the State Supreme Court require the "Appellant" and the "Respondents" to make a Statement of the Questions involved on the appeal. In this instant case, one of the questions involved as claimed by appellant was:

> "Can three members of a Board of Seven Trustees of a private corporation AT AN INFORMAL GATHERING legally represent that corporation, or legally transact any business of any kind of that corporation or pass any resolution of any kind that will bind that corporation? Trial Court in substance answered yes."

The Respondent, Chelan Mining Company, claimed the question involved was:

> "Where Articles of Incorporation provide for a Board of Seven Trustees, and the By-laws also provide that a majority of the trustees, for the time being in office, shall constitute a quorum, is the action of three at a regular called meeting and at a time wherein there are only five qualified and acting trustees in office binding on the corporations. The Trial Court answered in the affirmative."

Those two questions show that the question of the "Forged Deed" was raised by the Trial Court, because the Appellant's question was whether three members of a Board of Seven Trustees had any power to transact any business of the corporation or pass any resolution of any kind at an informal gathering of three trustees.

> The State Supreme Court in Trethewey v. Green River Gorge, 17 Wash. (2) 697, 136 Pac. (2d) 1011, and in Twisp Mining & Smelting Company v. Chelan Mining Company, et al., 16 Wash. (2d) 264, 133 Pac. (2d) 300, holds the law of the State of Washington is that a Board of Trustees of a corporation in the State of Washington can act only at legal meetings, but the State Supreme Court in this instant case adopted the false position of the Appellees and said:
>
> "The meetings of January 17th and 30th, 1934, were regularly called special meetings." When the testi-

mony of the Chelan Mining Company's own officer, clearly showed that neither of said purported meetings were regularly called meetings, but on the contrary were simply "*Informal Gatherings*" where no business of the corporation could legally be transacted as a matter of law.

There is also an affidavit in the Appellant's petition to the State Supreme Court for leave to file its Petition in the Superior Court of Okanogan County for relief from the judgment that was obtained by gross fraud of the defendants and by the knowing use of perjured testimony, which is not denied, showing:

> That the question of the "Forged Deed" was raised in the Trial Court in Appellant's Brief on Appellant's Motion to re-open the case for further evidence and a reconsideration of the Trial Court's Memorandum decision of February 5, 1942, and a copy of that Brief was served on each of the counsels for defendants, and each of them accepted service of same in writing and one of the counsels for the Twisp Company argued the question of the "Forged Deed" to the Trial Court in the presence of said defendants' counsel and therefore the statements of counsel to the State Supreme Court that the question of the "Forged Deed" was not raised in the Trial Court were absolutely false and untrue and known to be false when made for the evident purpose of obstructing the due administration of law and justice to the Twisp Mining & Smelting Company and its stockholders, by unlawfully preventing the State Supreme Court from passing on the question of the forged deed, which was one of the vital issues on said appeal. (See St. 1-15, and also page 19, R. 1 of Petition to the State Supreme Court for leave to file a petition in the Superior Court for relief.)

On February 3, 1939, W. E. Gamble, one of the stockholders of the Alder Group Mining & Smelting Company, a defunct corporation for more than 10 years, brought an action in the Superior Court of Spokane County, State of Washington, in Case No. 102961, of the files and records

of said court, seeking the appointment of a "Statutory Liquidating Receiver" under the provisions of Section 3803-53 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which provides under Paragraph 1, as follows:

> "The court may appoint a liquidating Receiver or Receivers" and the provisions of Section 3803-54 of Rem. Rev. Stat. (Sup.), which provides under Paragraph 1, as follows:
>
> "The Receiver or Receivers appointed as provided in the preceding Section, shall, after giving such bond as the court may require for the faithful performance of his or their duties *proceed with the liquidation of the affairs on the corporation in such manner as the court shall direct.*"

It is clear, then this "Receiver" having been appointed under the provisions of the above statutes, as a "Statutory Liquidating Receiver," had no lawful power or authority to engage in "New Business" on behalf of the defunct corporation and the Court had no jurisdiction, power or legal authority to grant any permission of any kind to that Receiver to do so.

In the Receivership proceedings (Exhibit 57), the Alder Group Mining & Smelting Company, and Robert S. Lewis and Fred B. Morrill, two of the surviving Trustees of its Board of Directors, were made party defendants, and they appeared and the appointment of the Statutory Liquidating Receiver, was made on the grounds that said surviving Trustee had entered into a contract of date of January 23, 1939, Exhibit II, with the Chelan Mining Company, which required them to enter into a lease of said real estate described in said lease, with Mahlon McCain and Chas. W. Gillespie, Exhibit 12, St. 116, who assigned said lease to the Methow Gold Corporation, Exhibit 15, St. 117, for the sole purpose of engaging in "New Business" on behalf of the defunct corporation, the Alder Group Mining & Smelting Company, which lease and assignment thereof was never filed for record in the Auditor's office of Okanogan County, State of Washington, until March 8, 1939,

some 13 days after W. E. Gamble duly filed with the Auditor of Okanogan County, State of Washington, a "Lis Pendens" giving notice to the world of the pendency of the Receivership action, wherein the ownership of the lands described in the purported lease were in litigation and prior to the appointment of this Statutory Liquidating Receiver on May 18, 1939, the Trial Court held the said contract of the two surviving Trustees with the Chelan Mining Company and the lease of the surviving Trustees with Mahlon McCain and Chas. W. Gillespie were null and void.

In Ellis v. McCoy, 99 Wash. 457, 169 Pac. 138, it was held that the "Lis Pendens" having been filed for record prior to the filing of the lease, that Mahlon McCain and Chas. W. Gillespie and their assignees took with constructive notice and were not innocent lessees or assignees of said lease and with notice of the fact that it had been adjudicated that the lease was null and void and that said Mahlon McCain and Chas. W. Gillespie and the Methow Corporation had no legal rights to the possession of the property described in said void lease, and in Gamble v. Alder Group Mining & Smelting Company, Robert S. Lewis and Fred B. Morrill, surviving Trustees, defendants, Fred B. Morrill, Appellant v. Seattle-First National Bank, Spokane & Eastern Division, as Receiver, Respondent, 5 Wash. (2d) 578, 105 Pac. (2d) 811, the State Supreme Court held:

> "Thereafter (meaning May 18, 1939, the date the Receiver was appointed) the appellant (Fred B. Morrill) filed a claim for services as Trustee and Attorney. The court allowed the claim insofar as such services were rendered in resisting the receivership action, but disallowing the claim for services prior to the institution of the receivership action. *They at no time prior to the beginning of the receivership action, attempted to wind up the affairs of the corporation or call a meeting of the stockholders.* * * *. *From the order appointing the receiver, no appeal was taken, and the order became final,* * * *. The corporation, being in the condition it was, unless authorized by statute, of which we know of none in this state, had no power

to transact new business. (Citing Authorities). Since it was the duty of the appellant and his associate to refrain from engaging in any new business, it would seem evident that the appellant (Mr. Morrill) would not be entitled to compensation for doing something which under the law, it was his duty not to do. The order appealed from is affirmed."

Likewise, under Section 3803-53 and Section 3803-54, of Rem. Stat., (Sup.), of the Uniform Business Corporation Act, of 1933, the Trial Court had no jurisdiction, power or authority to grant this "Statutory Liquidating Receivership" any right whatsoever to engage in new business, which the State Supreme Court in Gamble v. Alder Group Mining & Smelting Company, et al., 5 Wash. (2d) 578, as shown above held it was its duty not to do.

Exhibit 24 and 26 (St. 140, 141, & 157), shows that Robert H. Strong illegally induced James O. Cull, during the fall of 1933, who was then the Attorney for the Twisp Mining & Smelting Company to furnish him with all the records of the Twisp Company to certain mining property and agreed in substance with James O. Cull after making full investigation of the records, that if Mr. Cull would agree to procure all the assets of the Twisp Mining & Smelting Company for a "New Corporation", which was to be named the Chelan Mining Company, he would see that James O. Cull would be named as one of the Directors of the Board of Directors and one of the Assistant Secretaries and Local Agent for the Chelan Mining Company and James O. Cull admitted under oath at the trial of this cause in the Superior Court of Okanogan County, State of Washington, in substance as follows:

"I knew at all times on January 29th, and on January 30th, when the last meeting was held, and on January 17th, when the first meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. That was understood and arranged that I was to act as a director of the Chelan" (St. 35).

And in conformity, with the understanding and agreement with Robert H. Strong and James O. Cull, the Chelan

Mining Company was incorporated under the laws of the State of Washington, on January 26, 1934, and James O. Cull was named in the Articles of Incorporation as one of the members of the Board of Directors and on January 29, 1934, was elected as one of its Assistant Secretaries and local agent of the Chelan Mining Company (St. 85).

James O. Cull, according to his letter of date of January 24, 1934, to Roy K. Magney took the position that since John B. Hottel and Chas. W. Julian had resigned as Trustees on the Board of Seven Trustees of the Twisp Mining & Smelting Company at a regular meeting of the Board of Seven Trustees and John Goetz and Frederick C. MacDonald had been elected in their place and stead, and not having qualified by taking the oath of office, there were two vacancies on the Board of Seven Trustees during the month of January, 1934, and wrongfully induced the three Trustees of the Board of Twisp Mining & Smelting Company to believe that there being two vacancies on the Board of Seven Trustees, they could transact business of the Twisp Mining & Smelting Company as a Board of Five Trustees.

But James O. Cull, distinctly admits in writing, in that letter, that no notice of the holding of that purported special meeting of the Board of Trustees was ever mailed to Roy K. Magney, as provided must be done to hold a legal special meeting of the Board of Trustees, under the provisions of Articles II, Section 5 of the By-laws, and Roy K. Magney not being present at that purported meeting, that meeting of January 17, 1934, was merely an "Informal Meeting" at which no legal business of the Twisp Mining & Smelting Company could lawfully be conducted. (See photostatic copy of that letter attached hereto, which letter was not discovered until June 5, 1944 (R. No. 1, p. 6).

While James O. Cull falsely swore on the trial of this cause that he was appointed as Assistant Secretary of the Twisp Mining & Smelting Company at the "Informal Special Meeting" of the Board of Five Trustees, the Record which he prepared, being the purported minutes of the purported Special Meeting of January 17th, 1934, (Exhibit No. 7) shows he was merely appointed as "Secretary Pro

tem," and as late as towards the close of the purported "Informal Meeting of the Board of Trustees" of date of January 30, 1934, James O. Culll, in the purported Minutes of that "Informal Meeting" that he prepared, admits that he up to that time had merely acted, and was then acting as Attorney for the Twisp Mininng & Smelting Company.

He further falsely inserted in the purported Minutes that he prepared that the said purported Special Meeting of the Board of Trustees of that date of January 30, 1934, was held:

> "Pursuant to notice dully given by the President, copy of which is inserted iin the Minute Records preceding the Minutes of this meeting." * * *. "Absent, Trustee Roy K. Magmey, to whom notice of the meeting, as shown by the affidavit of mailing notices of the meeting heretofore iinserted in the Minute Records of the Company." (Siee Minutes attached to Exhibit No. 7).
>
> When there is no such affidavit inserted in the Minute Records of the Twisp Mining & Smelting Company and no such "Original Nootice" was inserted in the Minute Records and durimg the month of January, 1944, it was discovered thatt John C. Sawbridge never signed any "Original Noticee" for the call of Special Meeting of the Board of Trustees for January 30, 1934, and never authorized James O. Cull to send out any notices to any Trusteess for the holding of a Special Meeting of the Boardl of Trustees for January 30, 1934, and there is an affidavit of John C. Sawbridge in this Record at Page 6, R. No. 1 swearing to said facts and also swearing he was not the President of the Twisp Mining && Smelting Company after August 15, 1932. Therefore James O. Cull's testimony on the trial of this case in Okanogan County, State of Washington, in the Superiorr Court of that County was absolutely false and untrue that he mailed a true copy of an Original Notice signeed by John C. Sawbridge, as President, to the five Trrustees, when there was as John C. Sawbridge swore umder oath, no such Original Notice ever existed, and since this case turns on the

question of whether any Notice of the holding of a Special Meeting of the Board of Trustees of the Twisp Company for January 30, 1934, was given to Roy K. Magney, and whether Roy K. Magney was present or absent on January 30, 1934, whether it was a Board of Five or a Board of Seven, and John C. Sawbridge swears under oath he never signed any Notice for the call of any Special Meeting of the Board of Trustees for January 30, 1934, and James O. Cull has produced no Original Notice signed by John C. Sawbridge, then as a matter of law, James O. Cull's testimony was false and in truth and in law there was no legal Special Meeting of the Board of Trustees held on January 30, 1934, and there was no authorization ever given to John C. Sawbridge or James O. Cull to execute any deed in the name of the Twisp Mining & Smelting Company, as its officers for the transfer of all the assets of the Twisp Mining & Smelting Company to Robert H. Strong for the Chelan Mining Company and of necessity then the purported deed of date of January 31, 1934, constituted a "Forged Deed" and neither the Receiver nor the Chelan Mining Company nor the Methow Gold Company can legitimately claim any rights of any kind under such an instrument, and the Appellees have no standing in this case, because their whole case is based on the knowing use of perjured testimony to obtain a fraudulent judgment that cannot be legitimately maintained.

The State Supreme Court, referring to the Executory Sale Contract of date of November 23, 1927, made by the Alder Group Mining & Smelting Company as a defacto corporation, which it had a legal right to do, Exhibit No. 4, herein, said:

"Apparently, Mr. Morrill had nothing to do with this property, after he formed the corporation in 1906, until 1932, when Mr. Lewis forwarded to him the Magney contract, asking him to start proceedings to forfeit the contract, * * *. On August 24, 1932, Mr. Morrill brought an action in Spokane County to

> cancel the Magney contract. * * * Mr. Morrill stated that at the time he started the above action, there was nothing of record showing that the Twisp had or claimed any interest in the property." (See State Supreme Court's Opinion Pages 271, 272, 16 Wash. (2d) 264, 133 Pac. (2d) 300.)

And Exhibit No. 44, being the record in the action in Spokane County to cancel that Executory Sale Contract, Exhibit No. 4, was introduced in evidence in the Twisp Mining & Smelting Company's action, but it shows on the face of that record, which the Trial Court and the State Supreme Court apparently never examined, that the action was brought in the name of the Alder Group Mining & Smelting Company, as a dejure corporation, and that the Alder Group Mining & Smelting Company never alleged that it had paid its annual license fee last due the Secretary of State and could not, because it had not paid same and therefore as a matter of law under the ruling of the State Supreme Court in National Grocery Company v. Fur Trading Co., 3 Wash. (2d) 288, 100 Pac. (2d) 408, there stated it was held:

> "That under the provisions of Section 3842 of R. R. S., of 1932, no corporation shall be permitted to commence or maintain any suit, without alleging and proving it has paid its annual license fee last due."

The Trial Court under such circumstances had no jurisdiction of the subject matter of the cancellation of said "Executory Sale Contract" and the Alder Group Mining & Smelting Company had no legal authority to bring such a suit unless it could legally allege and prove it had paid its annual license fee last due and the Court had no jurisdiction over the Twisp Mining & Smelting Company, who was not even made a party to said action, and the assignment of said "Executory Sale Contract" to the Twisp Mining and Smelting Company being filed for record in the Auditor's office of Okanogan County, Okanogan, State of Washington, where the land was situated, on June 27, 1932, was notice to the Alder Group Mining & Smelting Company that required the Alder Group Mining

& Smelting Company to make the Twisp Mining & Smelting Company a party to the purported action to forfeit said "Executory Sale Contract," Exhibit No. 4, herein, and the Twisp Mining and Smelting Company was not made a party to the action and therefore as a matter of law under the ruling in Patterson v. Ford, 167 Wash. 121, 8 Pac. (2d) 1006, that "Executory Sale Contract" was never cancelled or forfeited.

This Statutory Liquidating Receiver charged with constructive notice of the above facts, and also charged with notice of the fact that the purported contract of date of January 23, 1939, and the purported lease of January 23, 1939, were held null and void in the Receivership case just prior to the appointment of the Receiver, as a Statutory Liquidating Receiver, joined with the Chelan Mining Company and the Methow Gold Corporation to purport a gross fraud upon the Trial Judge, and sought to obtain an exparte order illegally granting to the said Receiver purported authority to enter into an agreement with the Methow Gold Corporation to engage in new business on behalf of the Alder Group Mining & Smelting Company with the Methow Gold Corporation, which the Trial Court had no legal power or authority to do, and the Trial Court being deceived by the "Receiver" representations and wholly in excess of its jurisdiction, power and legal authority under Section 3803-53 of Rem. Rev. Statutes (Sup.), of the Uniform Business Corporation Act of 1933, entered an ex parte order on July 27, 1939, in the Receivership case, Case 102961, Exhibit No. 57, herein, purporting to grant the "Receiver" power and authority to enter into an agreement with the Methow Gold Corporation to engage in new business on behalf of the Alder Group Mining & Smelting Company that the State Supreme Court held, as already shown herein, could not legally be done. (Tr. 46) of date of July 27, 1939.

In St. Louis Smelting Company v. Nix, 272 Fed. (8th C. C. A.) 977, holds:

> "That in all statutory proceedings jurisdiction cannot be conferred by consent or omission to contest it, or by estoppel and whenever it appears as it did in this

case, that jurisdiction was probably lacking, it was the duty of the Court to inquire into it, regardless of the attitude of the parties."

Ranson v. Williams, 2 Wall. 313, by Law ed. 803, held:

> "The extent and nature of the power depends upon the terms in which it conferred and it will not be enlarged because exercised by Courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a Court of general jurisdiction, because no authority derived by law can transcend the source from whence it came; and the principal that a limited authority must appear to have been strictly construed even when the acts of a Superior Court are in question is well settled."

See also, Murray v. American Surety Co., 70 Fed. (9th C. C. A.) 341; also John Vallely, as Trustee v. Northern F. & M. Ins. Company, 254 U. S. 348, 65 L. ed. 297, where the Court after fully considering the question of the jurisdiction in statutory proceeding and the effect of estoppel, held:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contra vention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and that even prior to reversal."

Therefore, as shown by the foregoing, there is presented to this United States Supreme Court, a situation where Robert H. Strong entered into a written agreement with James O. Cull, who was then Attorney for the Twisp Mining & Smelting Company, for an illegal purpose of unlawfully procuring all the assets of the Twisp Mining & Smelting Company for a new corporation that was to be formed, under the name of the Chelan Mining Company.

It was agreed that James O. Cull was to be named as one

of the members of the Board of Directors of the Chelan Mining Company, and was to be elected as one of the Chelan Mining Company's assistant secretaries and local agent and to have full authority of the Chelan Mining Company to procure all the assets of the Twisp Mining & Smelting Company in any way that James O. Cull deemed advisable and to that illegal end James O. Cull, acting secretly as one of the "Assistant Secretaries" of the Chelan Mining Company usurped the office of Secretary of the Twisp Mining & Smelting Company, in place of Harold Simonds, the real Secretary, and falsely claimed that he had mailed a copy of an "Original Notice" for the call of a Special Meeting of the Board of Five Trustees of the Twisp Mining & Smelting Company for January 30, 1934, which "Original Notice" James O. Cull falsely claimed was signed by "*John C. Sawbridge*", when no such notice was ever signed by John C. Sawbridge, as "President" or at all, as shown from John C. Sawbridge's affidavit and now it has been discovered that James O. Cull never mailed any legal notice for the call of the special meeting of the Board of Trustees for January 30, 1934, to Roy K. Magney, who was one of the members of the Board of Trustees of the Twisp Company and Roy K. Magney was not present at the "Informal Special Meeting of the Board of Trustees on January 30, 1934.

The law of the State of Washington, as expressed to Twisp Mining & Smelting Company v. Chelan Mining Company, et al., 16 Wash. (2d) 264, 133 Pac. (2d) 300 and in Trethewey v. Green River Gorge, 17 Wash. (2d) 697, at 727 and 728, 136 Pac. (2d) 1011, is settled that Trustees of a Board of Trustees of any corporation in the State of Washington cannot act in an individual capacity outside of a "Formal Meeting".

It is certain then, that as now discovered, there was no legal special meetings of the Board of Trustees of the Twisp Mining & Smelting Company held on either January 17th or January 30th, 1934, and that being an undisputable fact, there was no legal power or authority given to John C. Sawbridge, to execute any deed for any purpose in the name of the Twisp Mining & Smelting Company as its

"President", and likewise there was no legal power or authority given to James O. Cull to execute any deed for any purpose in the name of the Twisp Mining & Smelting Company as its "Assistant Secretary" and therefore that purported "Quit Claim Deed" of date of January 31, 1934, Exhibit 20, being signed by John C. Sawbridge and James O. Cull, without legal authority being given them by the Board of Trustees constitutes a "Forged Deed" under the provisions of Section 2586 of Remington's Revised Statutes of the State of Washington, and cases cited herein.

Counsel for the Receiver and Counsel for the Methow Gold Corporation, when they in writing advised the State Supreme Court to obstruct the due administration of the law and justice to the Twisp Mining & Smelting Company and its stockholders, that the "Forged Deed" was never raised in the Trial Court and by reason of false claims prevented the State Supreme Court from passing on the question of the "Forged Deed," one of the vital issues on that appeal, they cannot dispute the fact that their false statement in writing rendered the affirmance by the State Supreme Court a final decision on a fraudulent begotten judgment within the meaning of the decision of this United States Supreme Court in Hazel-Arlas Glass Co., v. Hartford-Empire Co., 88 U. S. Law Advance Opinions, 936 and that coupled with the knowing use of perjured testimony that is now exposed, presents a case that should be reviewed by this United States Supreme Court to establish for the benefit of the Twisp Mining & Smelting Company and its Stockholders, and the Stockholders of each and every corporation in this United States, whether the property and the property rights of a Domestic Corporation can be legally confiscated by a "Forged Deed".

Under the statutes of the State of Washington, in a case like this instant case, as held in Haaga v. Saginaw Lumber Co., 170 Wash. 93, 15 P. (2d) 655, the State Supreme Court is given power to make an order granting leave to a litigant against whom a fraudulent begotten judgment was obtained, to petition the Superior Court where that fraudu-

lent begotten judgment was obtained for the relief stated in White v. Donini, 173 Wash. 34, 21 P. (2d) 265, to-wit:

> "Two questions are presented by the Petition: (1) Has this Court jurisdiction to grant the Trial Court permission to hear the two motions presented by the Petition? And (2) If this Court has jurisdiction, is this a proper case for its exercise? That the Court has such power is beyond question; under our decisions, Haaga v. Saginaw Logging Company, 170 Wash. 93, 15 P. (2d) 655; State Ex Rel Cross v. Superior Ct. 158 Wash. 46, 51, 290 Pac. 430; In re Shilshone Avenue, 101 Wash. 135, 172 Pac. 338. The present writer did not subscribe to the prevailing opinion in the recent Haaga case, but expressed his dissent therefrom. The dissent was based upon the grounds that the evidence therein, on which a new trial was sought, was not 'newly discovered,' but 'newly created'. That is, that it was evidence of a condition that had arisen long after trial and judgment, and further, *that it was not shown that any fraud had been practiced in securing the verdicts.* The case at bar not only falls within the rule in the Haaga case, but also escapes the disapproval voice in the dissent. The evidence here sought to be introduced is not only newly discovered, but raises a question of false testimony."

Referring to the case, In re Shilshole, above referred to, the question was raised that since the "Original Judgment" was entered more than one year before the present proceedings were filed in the Supreme Court, the Petition was too late, but the Supreme Court held that since an appeal had been taken to the Supreme Court the time did not start to run until the appeal was disposed of and in this instant case since the Original Judgment was appealed to the State Supreme Court and from there was appealed to the United States Supreme Court and the mandate of the United States Supreme Court was not filed with the Clerk of the State Supreme Court until January 24, 1944, and the Petition for relief was duly filed with the State Supreme

Court on June 23, 1944, the Petition for relief was timely filed, and this Court in Hazel-Atlas Glass Co., v. Hartford-Empire Co., supra, holds that under certain circumstances, one of which is after discovered fraud, relief will be granted against judgments regardless of the term of their entry.

The Petition that was filed in the State Supreme Court for leave of the State Supreme Court to apply to the Superior Court of Okanogan, State of Washington, for relief which the State Supreme Court in White v. Donini, 173 Wash. 93, supra, was one which the State Supreme Court had "Original Jurisdiction" to entertain and Article IV, Section 2 of the Constitution of the State of Washington provides:

> "* * * In the determination of causes, all decisions of the (Supreme) Court shall be in writing, and the grounds of the decision shall be stated. * * *"

In this instant case, the Petitioner by Formal Motion requested additional time to present this matter on oral argument. However, the Judge who wrote the opinion, acting as the Chief Justice, denied that request, and on July 21, 1944, also acted as the Chief Justice and only allowed counsel for petitioner fifteen minutes to present the Petitioner's case, which was wholly inadequate for counsel to argue so important a matter and the Department which heard this matter denied the petition without writing any opinion contrary to Article IV, Section 2 of the State Constitution, and thereby denied the petitioner a hearing on his petition for relief within the meaning of the Fourteenth Amendment to the Constitution of the United States on July 21, 1944, and petitioner duly filed a petition for rehearing within the time allowed by law, and on August 29, 1944, the Judge who wrote the original opinion on affirming the judgment of the lower court denied the petition for rehearing without writing any opinion, and attached hereto is one of the printed petitions for rehearing that was filed with the State Supreme Court; and it is from the order denying petitioner's petition for relief of date of July 21, 1944 and order denying the petition for a rehearing of date of August 29, 1944, that this appeal is taken for a review of the matter before this Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. —

TWISP MINING & SMELTING COMPANY, a Corporation,
Appellant,

vs.

CHELAN MINING COMPANY, a Corporation, SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the Alder Group Mining & Smelting Company, a defunct corporation; and Methow Gold Corporation, a Corporation, *Appellees.*

Praecipe for Transcript

To Honorable Benj. T. Hart, Clerk of the Supreme Court of State of Washington:

WHEREAS, the above-named appellant had petitioned for and has obtained an order allowing an appeal of the above-entitled cause from the Supreme Court of the State of Washington to the Supreme Court of the United States of America, and WHEREAS, the order allowing the said appeal further orders that a transcript of the record be prepared by you and transmitted by you to the Supreme Court of the United States and that said transcript be certified by you:

NOW, THEREFORE, pursuant to Rule 10, Paragraph 2 of the Rules of the United States Supreme Court, and Rules 75-77 of the Equitable Rules of the United States, you are requested to include in said transcript the following, to-wit:

1. Original order for appearance of appellant.
2. Original Petition for Appeal, Assignments of Error, and Prayer for Reversal.
3. Original Order Allowing the Appeal.
4. Original Citation on Appeal.
5. Original Praecipe for Transcript on Appeal.
6. Original Notice pursuant to Rule 10, Paragraph 2 of the United States Supreme Court Rules pertaining to

the lodgment of that part of the State Court records and testimony in narrative form or by questions and answers in said cause as provided by Rules 75-77 of the Equitable Rules of the United States Supreme Court and also of Rule 12, Paragraphs 2 and 3 of the Rules of the Supreme Court of the United States.

7. Original of that part of the State Court Records and testimony in narrative form or by questions and answers as provided by Equitable Rules 75-77 of the United States Supreme Court, that appellant deems material for the review of the questions raised on this appeal to the United States Supreme Court as filed and lodged with you pending settlement of the State Court Record by the Chief Justice of the Supreme Court of the State of Washington.

8. Original Statement of Appellant as to jurisdiction of the United States Supreme Court of the Appellant's appeal of this instant case.

Dated this 20th day of November, 1944.

LUCIUS G. NASH,
Attorney for Appellant,
726 Paulsen Bldg.,
Spokane, Washington.

SUPREME COURT OF THE UNITED STATES

TWISP MINING & SMELTING COMPANY, a Corporation,
Appellant,

v.

CHELAN MINING COMPANY, a Corporation, et al., *Appellees*

PETITION FOR APPEAL

Considering itself aggrieved by a final decision of the Supreme Court of the State of Washington in this equity case, said court being the highest court of the State of Washington, in an equitable cause, your petitioner respectfully shows:

That in accordance with the Judicial Code, Section 237 (a) (United States Code 28, Section 344), and in accord-

ance with the Rules of the Supreme Court of the United States (Rule 46, Para. 2), your petitioner respectfully shows that the case is one in which, under the legislature in force when the act of January 31, 1928 (45 Stat., 54) was passed, to-wit: Under Section 344, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of rights.

ASSIGNMENTS OF ERROR

1. The Supreme Court of the State of Washington erred in denying the Appellant the equal protection of that part of Section 3803-31, paragraph 1 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which provides:

> "A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

2. The Supreme Court of the State of Washington erred in holding that since John B. Hotten and Chas. W. Julian resigned as Trustees of the Board of Trustees of the Twisp Mining & Smelting Company on August 15th, 1932, and John Goetz and Frederick C. MacDonald were elected as Trustees in their place, but failed to qualify as James O. Cull reported, by taking the oath of a Trustee, that there were two vacancies on the Board of Seven Trustees of the Twisp Mining & Smelting Company during the month of January, 1934.

3. The Supreme Court of the State of Washington erred in holding that assuming the Board of Trustees of the Twisp Mining & Smelting Company was a Board of Five Trustees and four of said Trustees consented in writing that a special meeting of said Board of Five Trustees could be held on January 30th, 1934, and the fifth Trustee Roy K. Magney, was never notified of the holding of such a special meeting and was not present at the purported special meeting of that Board of Five Trustees on January 30, 1934, that three of those Trustees that had consented to the holding of that purported special informal meeting

of said Board, could pass a legal resolution for the transfer of all the assets of the Twisp Mining Company to a new corporation by the name of the Chelan Mining Company.

4. The Supreme Court of the State of Washington erred in holding that those three Trustees had jurisdiction and lawful power at that "Informal Meeting" of the Board of Five Trustees of the Twisp Mining & Smelting Company to transact any business of any kind of the Twisp Mining & Smelting Company.

5. The Supreme Court of the State of Washington erred in holding that those three trustees of the Board of Five Trustees at that "Informal Purported Meeting" had any power or lawful authority to legally authorize anybody to execute any "Quit Claim Deed" in the name of the Twisp Mining & Smelting Company, as its President or its Assistant Secretary for the purpose of transferring all the assets of the Twisp Mining Company to the Chelan Mining Company without any consideration passing to the Twisp Mining & Smelting Company.

6. The Supreme Court of the State of Washington erred in finding that James O. Cull, the "Assistant Secretary" of the Chelan Mining Company had delivered a certificate of stock of the Chelan Mining Company for 250,000 shares to the Twisp Mining & Smelting Company and that the Twisp Company still has that certificate, when James O. Cull testified that the Twisp Mining & Smelting Company, refused to accept that certificate of stock or consummate the illegal purported transaction of the transfer of all its assets to the Chelan Mining Company without due authority from the Twisp Mining & Smelting Company, and James O. Cull admitted he still holds that certificate of stock and the Twisp Company never had that certificate of stock.

7. The Supreme Court of the State of Washington erred in holding by its refusal to pass on the question of "Forged Quit Claim Deed" of date of January 31, 1934, exhibit 20 herein, that the Chelan Mining Company took a valid title to all the assets of the Twisp Mining & Smelting Company by virtue of a "Forged Deed" that was executed by John

C. Sawbridge, as President of the Twisp Company and James O. Cull, as Assistant Secretary of the Twisp Company, when neither of those gentlemen were officers of the Twisp Company and were never legally authorized by the Twisp Company or its Board of Trustees to execute such an instrument.

PRAYER FOR REVERSAL

For which errors the appellant, Twisp Mining & Smelting Company, a corporation of the State of Washington, prays that the final order of the Supreme Court of the State of Washington of date of August 29th, 1944, denying Appellant's petition for rehearing (R. p. 7), and the final order or judgment of the Supreme Court of the State of Washington of date of July 21, 1944 (R. p. 7, No) in the above entitled cause, be reversed and a judgment or decree rendered by this United States Supreme Court in favor of the Appellant directing the State Supreme Court to enter an order granting this Appellant leave of the State Supreme Court to file its Petition or Motion with the Superior Court of Okanogan County, State of Washington for a new trial or in the alternate to file its petition or motion to re-open the case for further testimony, and for costs.

LUCIUS G. NASH,
Attorney for Appellant,
726 Paulsen Bldg.,
Spokane, Washington.

Office - Supreme Court, U. S.
FILED
JAN 29 1945
CHARLES ELMORE CROPLEY
CLERK

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY,
Petitioner,

vs.

CHELAN MINING COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

LUCIUS G. NASH,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Petitioner,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE-FIRST NATIONAL BANK, ACTING THROUGH ITS SPOKANE & EASTERN BRANCH, AS RECEIVER FOR THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Comes now the Appellant, Twisp Mining & Smelting Company, out of abundance of caution, under the provisions of Section 237 (c) of the Judicial Code of the United States and moves this Honorable Court in the event that this Honorable Court takes the position that appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court on November 20th, 1944, to treat the papers whereon the appeal was allowed by the State Supreme Court as a petition for certiorari and as if presented

to this Court at the time they were presented to the Judge who allowed the appeal on the grounds and for the following reasons, to-wit:

The final order or judgment of the State Supreme Court was entered on July 21, 1944 and the order denying the Petition for a rehearing was entered on August 29, 1944, and the Chief Justice of the State Supreme Court entered an order allowing the appeal of this cause to the United States Supreme Court on November 20th, 1944 (R. 1, p. 24).

Thereafter and on November 21, 1944, the appellant duly caused to be served on each of the Respondents a copy of an order of the Chief Justice of the State Supreme Court of date of November 20th, 1944, which was made pursuant to Rule 10, para. 2 of the Rules of the Supreme Court of the United States, which provides:

> "On consideration of the above request of Appellant, and good cause therefor in this particular case having appeared why this Order should be made, *It is now here ordered*, that the Clerk of the State Supreme Court shall certify separately to Honorable Charles Elmore Cropley, Clerk of the United States Supreme Court at Washington D. C., the '*Original Transcript*' of the pleadings in this cause in the Superior Court of Okanogan County, State of Washington, and the '*Original Statement of Facts*' in the same cause, and the following '*Original Exhibit's*— Nos. 4, 7, 10, 11, 12, 15, 20, 21, 21A, 24, 26, 44 and 57, all of which are now on file with the Clerk of the State Supreme Court, so that the same may be referred to if deemed necessary to verify the reference made by Appellant in the narrative form Record; Statement as to Jurisdiction and Briefs on appeal or statement in opposition to such jurisdiction if made, and also be available for the use of the United States Supreme Court or any Justice thereof, who may desire to inspect them for any purpose whatsoever." (R. pp. 1 & 2) (Italics ours).

And at the same time the Appellant duly caused each of the Appellees to be served with a copy of the Appellant's proposed parts of the records of the State Supreme Court that Appellant deemed material for a review of the questions raised and involved on the appeal to the Supreme Court of United States that was lodged with the Clerk of the State Supreme Court (R. 1, pp. 1 to 40 and R. 2, pp. 1 to 25); including Appellant's Petition for Appeal; Assignments of Errors; and Prayer for reversal; Order allowing the appeal; Citation on Appeal, and Notice to the Appellees of the lodgment of same with the Clerk of the State Supreme Court, and also Notice of the provisions of Rule 12, Page 3, of the Rules of the Supreme Court of the United States; and also duly served a copy of the Appellant's Statement as to Jurisdiction of the Supreme Court of the United States of this appeal on each of the appellees, and a written acceptance of same appears in the Record on appeal (R. 2. pp. 46, 47, 48).

None of the appellees made any objections to the appellant's proposed narrative form record on appeal; none of them served or filed any praecipe with the Clerk of the State Supreme Court for any additional parts of the State Supreme Court's record; none of them served or filed with the clerk of the State Supreme Court any typewritten or printed statement disclosing any matter or ground against the jurisdiction of the Supreme Court of the United States of Appellant's appeal and none of them ever served or filed any motion to dismiss the appeal and each of the Appellees were duly served with written notice of the settlement of the record on appeal by the Chief Justice of the State Supreme Court on or before January 3rd, 1945, and written acknowledgment of service appears thereon, and none of them appeared or made any objection in person or in writing to the certification of the Appellant's narrative form, proposed transcript on appeal and the Chief Justice

of the State Supreme Court duly certified same as the official transcript on the appeal on January —, 1945 (Tr. 2, pp. 50, 51).

This present application under the provisions of 237(c) of the Judicial Code of the United States, in the event that this Honorable United States Supreme Court should deem the Appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court is based, on the grounds that the Judgment and Decree of the Superior Court of Okanogan County, State of Washington and the affirmance thereof by the State Supreme Court was the result of a deliberately planned and carefully executed scheme to defraud the Trial Court and the State Supreme Court and the Twisp Mining & Smelting Company by the knowing use of perjured testimony and fraudulent representations to fraudulently obstruct and defeat the due administration of justice in the manner indisputably to be shown herein which involves far more than an injury to a single litigant, for it was the perpetration of a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

The record in this case, shows by Exhibits 24 and 26 (St. 157), coupled with Robert H. Strong's testimony (St. 151), that Robert H. Strong and his associates entered into a deliberately planned scheme to illegally obtain the assets of the Twisp Mining & Smelting Company and on the trial testified, as follows:

> "Q. I will ask you to refresh your recollection from Exhibit #26 with their endorsements on there, does it not give you the authority to organize the Chelan Mining Company or any company you wished, on such terms as you desired? A. This reads, "In the memorandum which the four of us entered into under date of November 17, 1933, it was set out in paragraph 2

that we were to obtain a new contract satisfactory to the four of us, from the Twisp Company." And then I go on and say: "If agreeable to you I think it would be wise to mutually agree that I am at liberty to enter into any arrangement with the Twisp Co., either in the form of a contract or by transfer or exchange of stock, between a new company and the Twisp Company, if the same is done in the interest of all four of us and otherwise in accordance with the spirit of the contract." "That is my letter. I didn't read it completely." (St. 151). The part of that letter that Mr. Strong failed to read, is as follows:

"As things are developing now it is probably that we will not ask for any contract from the Twisp Co., but rather a transfer of the property to a new corporation that will be formed."

And in this connection, Mr. James O. Cull, testified: "Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington" (St. 32). "I (Mr. Cull) knew at all times, on January 29, and on January 30, when the last meeting was held, and on the 17th, when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan" (St. 35).

In other words, Mr. Strong as above stated, had arranged with Mr. Cull the "Attorney" for the Twisp Company to illegally obtain all the assets of the Twisp Company for the Chelan Mining Company and for such services Mr. Cull was named as one of the Board of Directors in the articles of incorporation on January 26th, 1934 and elected as one of the Assistant Secretaries and local agent of the Chelan Mining Company on January 29, 1934, (St. 86) and from that date James O. Cull by his own act ceased to be the bonified "Attorney" for the Twisp Mining & Smelting Company.

Section 3803-31, Para. 1, of Remington's Revised Statutes (Sup.), of the Uniform Business Corporation Act of 1933, went into full force and effect on January 1, 1934, and so far as material expressly provided:

> "A director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

And the Twisp Mining & Smelting Company's By-Laws, Article 11, Section 1, provided:

> "* * * The trustees shall act only as a board, and the individual trustee shall have no power as such." "And shall hold office for one year and until their successors are elected and qualified."

And Section 5, of Article 11, provides:

> "Special meetings of the Board of Trustees shall be held whevever called by the president, or by one-third of the trustees for the time being in office. The secretary shall give notice of each special meeting by mail, * * *, to each trustee; * * *."

The "Written Opinion" of the State Supreme Court, which appears in the *Twisp Mining & Smelting Company* v. *Chelan Mining Company, et al*, 16 Wash. (2d) 264, 289, 290, 133 Pac. (2d) 300, 311, shows that the "Writer" of that opinion, claimed that:

> "The meetings of January 17 and 30, 1934, were regularly called special meetings. The directors met as a board, and a quorum of the directors then in office being present, proceeded to transact the business of the corporation, referred to in the notice given of such meeting."

However, the record shows, that James O. Cull, who had sold out to the Chelan Mining Company which was to be

formed, and who knew he was to be one of the Assistant Secretaries of the Chelan Mining Company, testified on the trial of the case in the Superior Court, as follows:

> "Q. Will you (Mr. Cull) examine the preamble to the minutes of January 17, 1934, and state whether that was a regularly called meeting * * *? A. * * *. There was notice to the directors that we recognized, *except Roy K. Magney, who was absent* * * *. Mr. Simonds notice had been sent sent to him *but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting*" (St. 26). (Italics ours.)

On January 24, 1934, Mr. Cull wrote Roy K. Magney a letter, which was discovered on June 5, 1944, by accident, which informed Roy K. Magney:

> "We held an "*Informal Meeting*" here on the 17th and adopted a resolution in form as per copy herewith. I told Mr. Strong, who was here at the time, that we would call and hold a regular meeting of the trustees, informing him that there are only five active Trustees at the present time, to-wit, you and Sawbridge and Coons and Hull and Simonds; there being two vacancies on the Board which resulted in 1932 when Hottel and Julian resigned and we elected Goetz and his friend, MacDonald of Seattle. Neither of them ever qualified by taking the oath of office, * * *."

But the statute law just quoted, provides that Hottel and Julian being duly elected and qualified Trustees, before they resigned, remained as trustees until their successors were duly elected and qualified, and therefore as a matter of law there were no vacancies on the Board of Seven Trustees of the Twisp Mining & Smelting Company during the month of January, 1934, as falsely claimed by Mr. Cull and wrongfully adopted by the "Writer" of the opinion in face of the undisputable fact that Mr. Strong, and his attorney,

Mr. Cole, and Mr. Cull were present at that "Informal Meeting" of date of January 17th, 1934, and Mr. Cull testified on the trial as follows:

> "I didn't send out formal notices for the January 17th meeting" (St. 52) Mr. Simonds notice had been sent to him but so far as a notice as required under the By-Law to hold a meeting to act upon the questions considered, it was not a regularly called meeting. We (Mr. Strong, Mr. Cole and Mr. Cull) decided to give notice and hold a meeting later" (St. 26).

And it is positive, that the "Writer" of the Opinion, never found any evidence in the record, to support his contention that the purported special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 17th, 1934 was a regularly called special meeting or even a legal meeting in any sense of the word.

Mr. James O. Cull, in order to deceive the Trial Court and the Supreme Court of the State of Washington, after admitting that he had mailed no "Notice" to any of the "Trustees" of the Board of Seven Trustees, or the Board of Five Trustees, of the Twisp Mining & Smelting Company for the holding of a special meeting of the Board of Trustees for January 17, 1934, and having knowledge of the provisions of Section 3803-31, Para. 2 of Remington's Revised Statutes (Sup.) of the Uniform business Corporation Act and of the provisions of Article 11, section 1, of the By-Laws of the Twisp Company which positively provided that Mr. Hottel and Mr. Julian, who were the duly elected and qualified members of the Board of Seven Trustees of the Twisp Company, on August 15, 1932, were still members of the Board of Seven Trustees until their successors were duly elected and qualified and therefore even if James O. Cull claimed that Mr. Goetz and Mr. MacDonald never qualified by taking the oath as a Trustee, still

as a matter of law Mr. Hottel and Mr. Julian office as Trustees was never vacant and James O. Cull, as an attorney, was charged with that fact and his purported position that there were two vacancies on the Board of Trustees of the Twisp Company during the month of January, 1934, was absolutely false and untrue and there never in fact or in law was any Board of Five Trustees in existence during the month of January, 1934.

Mr. Cull, however, testified on the trial in the Superior Court that Mr. Robert H. Strong, and his Attorney James Cole were present at the "Informal Meeting" of three of the trustees of the Board of Seven Trustees" (St. 26), and further testified:

"Q. At this meeting which was held January 17th, 1934, it was decided to call another meeting of the directors of the Twisp Mining & Smelting Company?

"A. Yes.

"Q. At whose suggestions was that meeting called?

"A. Mr. Cole, as attorney, at the direction of Mr. Strong, raised the question as to the sufficiency of the notice.

"Q. Was that the reason?

"A. That was the reason another meeting was called for the 30th and formal notices issued and sent out.

"Q. Was the notice of the meeting to be held January 30, 1934, sent out by you to each of these five directors?

"A. Yes." (St. 54.)

"Q. Attached to these minutes and proceedings contained in Exhibit #7, is a notice of the meeting and attached to the notice is a form of the Resolution to be adopted?

"A. Yes."

"Q. Did you mail a copy of that notice and resolution to each of those five men whom you just mentioned as constituting the Board at that time?

"A. Yes, I did.

"Q. And did you mail this notice to Roy K. Magney at the address which you had ascertained?

"A. Yes." (St. 184) And Mr. Cull further testified: "The trustees at that time were Mr. Simonds, Mr. Sawbridge, Mr. Coons and Mr. Hull and Roy K. Magney." (St. 183)

Mr. Cull, further testified that he drafted the purported minutes of the purported special meeting of the Board of Trustees of the Twisp Company of date of January 30th, 1934, and also testified that it was Mr. Cole, one of the Assistant Secretaries of the Chelan Mining Company that suggested that Mr. Cull call a second special meeting of the Board of Trustees in violation of Article 11, Section 5, of the By-Laws, which provides that such a notice of any special meeting of the Board of Trustees shall be mailed by the "Secretary" and Harold Simonds was the "Secretary" and available. Mr. Cull, as shown from the purported minutes that he prepared of the purported special meeting of the Board of Trustees of date on January 30th, 1934, which were never approved by any Trustee that was present, or any officer of the Twisp Company, falsely states:

"Yakima, Washington,
"January 30, 1934.

"A special meeting of the Board of Trustees of Twisp Mining & Smelting Company, a Washington corporation, was held at Room 208 Holtzinger Building in the City of Yakima, Washington, on the above date * * * pursuant to notice duly given by the President, copy of which is inserted in the Minute Records preceding the Minutes of this meeting. The Trustees present were John C. Sawbridge, C. M. Hull and W. V. Coons, *being the majority of the Board of Trustees as now existing.* Absent, Trustee Harold Simonds, *who had executed written consent to the Trustees meeting of January 17, of which this meeting is an adjournment* * * *. Absent, Trustee, Roy K. Magney, to whom notice of this meeting was mailed as shown by the affi-

davit of mailing notices of the meeting heretofore inserted in the Minute Records of the Company."

That purported affidavit, of date of January 30, 1934, falsely states:

> "That, on the 19th day of January, 1934, on behalf of and at the request of John C. Sawbridge, President of said Company, I mailed to each trustee, respectfully, * * *, a notice of special meeting of the Trustees, to be held on January 30, 1934, * * *." But that purported affidavit was merely signed by James O. Cull, but never acknowledged before any Notary Public." (See purported Minutes for proof of that fact in Exhibit #7, now available to this Court.)

The "Writer" of the Opinion of the State Supreme Court, at page 279, of the Opinion as found in 16 Wash. (2d) 264, 133 Pac. (2d) 300, 307, based his decision on James O. Cull's false statements by saying:

> "A notice of the meeting of January 30, 1934, signed by John C. Sawbridge, as president, dated January 19, 1934, to which was attached a copy of the resolution passed at the January 17th meeting, was mailed to each of the five directors, at his last known address, on January 19, 1934, as appears from the affidavit of James O. Cull."

John C. Sawbridge, swore to an affidavit on April 15, 1944, which is set out in full in the Petition to the State Supreme Court for relief, on pages 16, 17 and 18, that is attached to the Record on Appeal to this court, in which he swears:

> "Affiant further states that he never signed any Notice for the call of a special meeting of the Board of Trustees for the 30th of January, 1934, and never authorized James O. Cull to mail any Notices to anyone for said meeting and affiant further states that nothing was brought up at that meeting of January 30th, 1934 about

John Goetz or Frederick C. MacDonald not qualifying and the purported minutes of that meeting, as inserted in Exhibit No. 7, were never approved by this affiant and the name 'John Sawbridge' that appears on the certified copy of those minutes, on Exhibit #10, is not the signature of this affiant * * *."

And in same Petition, there is another affidavit of John L. Magney, to the effect that the "Original letter of James O. Cull of date of January 24, 1934, to Roy K. Magney, was found—by him on June 5, 1944, and that a true copy of said letter was inserted in said Petition on page 6, which shows that James O. Cull admits that the purported special meeting of the Board of Trustees of the Twisp Company of date of January 17, 1934, was merely an "Informal Meeting" and there is no mention made in said letter about the holding of a special meeting of the Board of Trustees for January 30th, 1934, and there never was any "Original Notice" signed by John C. Sawbridge and there being no "Original" there could not as a matter of law have been any legal copy mailed to Roy K. Magney as James O. Cull falsely claims there was and Roy K. Magney being one of the recognized "Trustees" of the Board of Trustees of the Twisp Mining and Smelting Company having been given no notice of the holding of the purported special meeting of the Board of Trustees and not being present there was no legal meeting held on January 30th, 1934, and no legal resolution of any kind or for any legal purpose whatsoever was ever passed at that manifest "Informal Gathering of Three of the Trustees" on the Board of Trustees on January 30th, 1934, whether it was a Board of Five Trustees or a Board of Seven Trustees and as a matter of law under such a state of affairs neither John C. Sawbridge nor James O. Cull were ever given any legal authorization or legal authority to execute that purported quit claim deed of date of January 31, 1934, Exhibit #20 herein, made in the name of the

Twisp Mining & Smelting Company, by persons who were never legally authorized to do so and said "Deed" under the provisions of Section 2586 of Remington's Revised Statutes of the State of Washington was and is a *"Forged Quit Claim Deed."* The Respondents knew that fact and none of them had any legitimate defense to that undisputable fact.

There is an affidavit in the "Petition" for relief to the State Supreme Court of W. B. Mitchell, a stockholder in the Twisp Company, now made a part of the Record on appeal to this Court, which shows:

> "That (W. B. Mitchell) affiant duly served a Brief of the Twisp Company in support of the Twisp Company's Motion to re-open the case and for a reconsideration of the court's Memorandum decision of February 5, 1942, on Counsel for the Receiver, and Counsel for the Chelan Mining Company and the Counsel for the Methow Gold Corporation and obtained each of said counsels written acceptance of service of said brief and on page 8 of said brief the following appears: "Therefore, as a matter of law, there being no legal meeting of the Board of Seven Trustees, by reason of the facts that no notice was given all the trustees that such a meeting was to be held or such action was to be taken, and no consent to hold a special meeting from all the trustees, * * *, the so-called 'Quit Claim Deed', wherein the Twisp Mining & Smelting Company, a corporation is vendor, and Robert H. Strong, is vendee of date of January 31st, 1934, is absolutely void because its execution was never effectively authorized by the Board of Trustees of the Plaintiff's corporation, in whom was vested the sole power to give such authorization. And that *void Quit Claim Deed,* under such a state of fact, constitutes a forged quit claim deed under the provisions of Section 2586 of Rem. Rev. Stat., which expressly provides: 'The false making or forging of any instrument or writing purporting to have been issued by

or in behalf of a corporation or association, * * * and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, association, * * *, is forgery in the same decree as if that person were in truth such officer or agent of such corporation, * * *."

The Receiver, however, knowing that fact and knowing there could be no defense made to a *"Forged Deed"*, with an intent to obstruct the due administration of justice to the Twisp Company, sanctioned its counsel to falsely maintain before the State Supreme Court, as follows:

> "In view of the very peculiar position taken by the substituted counsel for the appellant in their opening brief in injecting the suggestion about a 'forged deed', It may be proper to point out that, up to the time that brief was served, there had never been a charge of fraud, misconduct or any intentional improper act on the part of any trustee or officer of the Twisp Mining & Smelting Company, or on behalf of any other party to the litigation. The complaint, both as original and as amended, contained no charge of fraud and the record is equally silent. The complaint was drawn and the case tried solely on the theory that the lack of a quorum rendered the proceedings void as a matter of law. Certainly the Court will not permit the injection of any such claim into this case on appeal." (Brief p. 8)

And the Methow Gold Corporation by its counsel joined with the Receiver and falsely claimed to accomplish the same legal end, as follows:

> "In reply to the charge of forgery set forth in the briefs submitted by appellant, we are prone to believe that this is the brain child of W. B. Mitchell, the clerk employed by Attorney W. G. Boland. There is * * * no argument about forgery before the trial court. Consequently, Judge Brown, the trial

judge, would be surprised to learn that there was an allegation of forgery in this case." (Brief p. 28)

In the first place, the trial judge, stated in his Memorandum of January 7, 1941, that the plaintiff's cause of action was based on illegal acts of the Chelan Mining Company saying:

> "This being the situation I must look upon the complaint as being a single purpose effect to set up the invalidity in the conveyance on the sole grounds *that it was consummated without authority and was not binding on the Twisp Mining & Smelting Company,* the plaintiff herein, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers and agents of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unwholly character of the color of title which is acquired." (St. 341)

These respondents, then, as above shown, deliberately and intentionally mislead the "Writer" of the State Supreme Court's Opinion, who manifestly accepted their false statements as true and thereby committed a reversible error in holding the false statements of those two respondents as true and by reason of that situation based the following ruling on a false premise, to-wit:

> "It may be stated that this case was not presented to this court by the same counsel who tried the case for appellant, and we assume that the briefs were not prepared by counsel who tried the case. We make this statement for the reason that counsel on behalf of the appellant in this court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made in the lower court; in fact no contention was

made in the lower court that the then directors of appellant, or Strong, or the Chelan Mining Company, acted other than in good faith. The case was tried by appellant purely upon the theory that there was no quorum of the directors present on January 17, or January 30, 1934, authorized to pass the resolution, and that therefore, the resolution passed on January 17, and adopted on January 30, was null and void, and the deed executed pursuant to such resolution was also null and void. *We therefore cannot consider the claim* now made in this court that the deed was a forgery." (Supreme Court's opinion, page 270)

It is very apparent, that the "Judge" who writes the "opinion" is the only Judge that reads the Record, in the State Supreme Court, for the obvious reason that the "Writer" of the Opinion has based his opinion of the "Forged Deed" on the false statements of "Counsel" for two of the "Respondents" that were before the State Supreme Court. In order to illustrate this important point, we will quote the law governing the situation, as stated in *Hutchinson Realty Co.* v. *Hutchinson,* 136 Wash. 184, 239 Pac. 388:

> "This action was commenced in the Superior Court by the plaintiff, Hutchinson Realty Company, against the defendant, Josephine Hutchison, seeking recovery of certain real property and the quieting of its title thereto by the removal of clouds thereon in the form of deeds of conveyances purporting to have been executed wholly without consideration moving to it *and wholly without authority of its President so pretending* to execute them, all of which was well known to her at the time of receiving the deeds." Deeds were held to be void.

To the same effect is the case entitled *Hotaling* v. *Hotaling* (Cal), 224 Pac. 435, where the court held:

> "The trial court held that the deed was void and the appellate court affirmed the trial court's ruling, and

in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors in whom was vested the sole power to give such authority.' "

In *Almo Trust Co.,* (Tex.), 203 S. W. 413, 414, was a case were it failed to recite a lien on the land, was a forgery and that the real deed recited a vendor's lien to secure the purchase money, and retaining the superior title to W. C. Scott and wife in the land and the court held:

"The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statutes as to deeds being void as to subsequent purchasers, without notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relied, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolute void and ineffective as though it had never existed. * * *. When the deed that was recorded in Cameron County which purports to be the deed of W. C. Scott and wife was attacked by an affidavit of forgery, the burden rested upon the appellant to show that it was a genuine instrument."

The act of forging a deed or other instrument is an illegal act, and *Colby* v. *Title Insurance & Trust Company* (Cal.), 117 Pac., 915, 918, in passing upon the validity of a deed that was obtained by an illegal act, held:

"The doctrine of estoppel by conduct or by latches or even ratification, has no application to a contract or other instrument which is void, because it violates an express mandate of the law and dictates of public policy. Such a contract or instrument had no existence

whatever for any purpose, and neither action or inaction of the parties to it can validate it; and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity."

In *Lewis* v. *Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the Court likewise held on the subject of a forged deed, as follows:

> "It is unquestionable the general rule that one holding under a forged instrument, however ignorent he may be of the forgery or how musch of value he may have parted with in reliance on the genuineness of the instrument, *cannot claim protection against the title of the rightful owner.* As some courts have said, it would be a monstros doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

In *Kline* v. *Mueller* (Okl.) 276 Pac. 200, 206, the court held:

> "A forged deed is void, and the same, though recorded in due form is ineffective as a muniment of title, even as to subsequent purchasers in good faith without notice."

In *Abee* v. *Garges* (Tex.), 65 S. W. 489, the court held:

> "The — in a quitclaim deed, even though for value and without notice, takes the risk of the genuineness of each and every deed in the line of the grantor's title."

In *State* v. *Fay* (Minn.), 83 N. W. 158, 159, the court held:

> "A 'Check' was signed 'P. McDonald, by John McDonald' and was held to be a forgery. The writing alleged to be forged purports on its face to have been executed by P. McDonald by John McDonald. Hence it appears on the face of the instrument that, if it was genuine, it would possess legal efficacy as an order of

P. McDonald for the payment of money. *Therefore a representation that the instrument was genuine includes the representation that John McDonald was authorized to execute it for P. McDonald.* Now, when the defendant uttered the instrument as true, knowing it to be forged, he thereby represented and affirmed that agent purporting to execute it for his principal had authority to do so. He is bound by his own representations, and it is not necessary to allege in the indictment or prove on the trial such agency. Were it otherwise, all the party putting off the forged paper needs to do in order to escape conviction would be to deal in such paper only as purported on its face to be executed by an agent for his principal, but who had no authority to represent the principal in any way." And this case is again confirmed by the case entitled *Commonwealth* v. *Wilson* (Ky.), 12 S. W. 264, where the court held:

"* * * For not only was the plat certificate, as charged fraudulent, but, though made by the accused person, purporting to be not his individual, but official, act as surveyor, wherein the writing was false and deceptive, and whereby only would it have possessed legal efficiency if genuine and authentic. * * *"

Since, even the Trial Judge, states in his Memorandum of date of January 7, 1941, to-wit:

"It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand squarely on the proposition that the actions of the trustees of the plaintiff in January, 1934 were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents of the Chelan Mining Company,—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934." (St. 341.)

And it is now distinctly shown that the "Question of the Forged Deed" was raised in the Superior Court before the Trial Judge, and that counsels for the respondents in the State Supreme Court knew that fact and deliberately made false statements to pervert justice to the Twisp Mining & Smelting Company, they were tampering with the administration of justice in such a manner that it was a wrong against the institutions set up to protect consistently the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society, and since it was their own false written statements that caused the State Supreme Court to refuse to pass on one of the vital issues on that appeal to the State Supreme Court these appellees cannot lawfully be allowed to deprive the Twisp Mining & Smelting Company of its property and property rights by virtue of a "FORGED QUIT CLAIM DEED" under the authority of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed Advance Opinions, 1944, at pages 936 and the case following it in that same advance sheet that were decided on May 15, 1944.

In *Powell* v. *Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 Law Ed 158, 84 A. L. R. 527, the court held:

> "It has never been doubted by this court or any other so far as we know that notice and hearing are preliminary steps to the passage of an enforceable judgment, and that they, together with a legal competent tribunal having jurisdiction of the case, constitutes basic elements of the constitutional requirements of due process of law. The words of Webster, so often quoted, that by "*the law of the land*" is intended "*a law which hears before it condemns,*" has been repeated in various forms of expression in a multitude of decisions. * * *. "Judgments without such citation and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administrated."

James O. Cull's Testimony Was False

It must be remembered that James O. Cull sold out to Robert H. Strong prior to the January 17th, 1934, purported "Informal Meeting" of three of the Board of Seven Trustees of the Twisp Company, for an agreed consideration with Mr. Strong, that when the Chelan Mining Company was incorporated he was to be named in the Articles of Incorporation as one of the Directors of the Board of Directors of the Chelan Mining Company, and later elected as one of its "Assistant Secretaries and local agent in the State of Washington." (St. 32) Robert H. Strong and his attorney James Cole were present at that purported "Informal Meeting" or "Informal Gathering" of three of the members of the Board of Seven Trustees that was held on January 17th, 1934. (St. 26) And James O. Cull testified under oath as follows:

> "I knew at all times, on January 29th, and on the 30th when the last meeting was held, and on the 17th when the first Twisp meeting was held, that I was to be a local director in Washington of the Chelan Mining Company. That had been understood and arranged that I was to act as a director of the Chelan." (St. 35) And there and then James O. Cull ceased to be the bona fide attorney of the Twisp Company.

Mr. Cull, Mr. Strong and Mr. Cole knew that Section 3803-31, of Remington Revised Statutes, para. 1, (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, provided:

> "That a director shall hold office for the term for which he was named or elected and until his successor is elected and qualified."

On August 15, 1932, John B. Hottel and Charles W. Julian, were two of the duly elected and qualified Trustees of the Board of Seven Trustees of the Twisp Company and Mr.

Cull, Mr. Strong and his attorney Mr. Cole knew those undisputable facts and also knew that no person had been elected and qualified as successors to either James B. Hottel or Charles W. Julian and knew then as a matter of law that John B. Hottel and Charles W. Julian position as Trustees was not vacant, and that John B. Hottel and Charles W. Julian still remained as the duly elected and qualified trustee of the Board of Seven Trustees of the Twisp Company during the month of January, 1934.

> Mr. Cull, testified as follows: "Q. I will ask you this: When was it discussed with you and anybody in connection with the Chelan Mining Company, that you were to be a trustee (should be director) named in the Articles. and that you were to be assistant secretary of the Chelan Mining Co.? A. It was discussed prior to the January meetings of the Twisp. As I remember, Mr. Strong, who was negotiating for the property, would organize a Washington corporation. Whether it was discussed there at the meeting of the 17th—I feel sure they were there because Mr. Cole was the party who raised the question of formal notice to Roy K. Magney—or whether the proposition had been discussed before that. Mr. Strong was going to organize a Washington corporation, and would want a representative trustee in Washington and as I recall it was discussed, as I say, at one of these informal meetings * * *." (St. 31, 32)

James O. Cull, being examined by Counsel for the Chelan Mining Company, testified on the trial of this cause in Okanogan County, State of Washington, that he was appointed by action of the Board of Five Trustees of the Twisp Company, as its Assistant Secretary on January 17th, 1934, and continued as such "Assistant Secretary" from that time up until the meeting of April 5, 1939. (St. 165, 166) He further testified that Exhibit #10, was a certified copy of the purported special meeting of the Board of Trustees of

date of January 30, 1934, which he prepared and swore that said Exhibit #10 was a true copy of the original, which he inserted in Exhibit #7, and on further questions of Counsel for the Chelan Mining Company he again falsely testified:

> "Q. Were you at that time Assistant Secretary of the Twisp Mining & Smelting Company? A. Yes, I had been so designated on the 17th." (St. 74)

However, the purported minutes that James O. Cull, prepared of that purported special meeting of the Board of Trustees, shows on its face that James O. Cull was not appointed as "Assistant Secretary", but merely acted as Secretary Pro Tem in the absence of the regular Secretary, Harold Simonds, and the purported minutes of the Board of Trustees of January 30th, 1934, were also prepared by James O. Cull and shows on its face that James O. Cull was elected merely as Secretary Pro Tem and further as already shown herein that there was no notice of the holding of either purported special meeting of January 17th, 1934 or January 30, 1934, ever given to Roy K. Magney, and Roy K. Magney was not present at either purported meetings and no legal appointment of James O. Cull, as Assistant Secretary could have been made and was in fact never made and James O. Cull's testimony to the contract was false and untrue.

James O. Cull, in his capacity of a "Director" and "Assistant Secretary" and Local agent of the Chelan Mining Company, falsely posing before Three members of the Board of Seven Trustees of the Twisp Company, at an "Informal Gathering" of those three trustees, prepared a purported set of minutes of what took place at that "Informal Gathering" and inserted same in Exhibit #7, without having them approved by any one, except himself as "Secretary Pro Tem" of the Twisp Company. He then prepared a purported certified copy of those purported

minutes that he placed in Exhibit #7, and certified it was a true and correct copy of the minutes of a special meeting of the Board of Trustees of the Twisp Mining & Smelting Company of date of January 30th, 1934, and falsely testified on the trial, as follows:

> "Q. I will ask you if Exhibit #10 is a certified copy of the minutes of that meeting which you sent to Mr. James Cole, attorney at Portland, at his request? A. Yes.
> Q. Were you at that time assistant secretary of the Twisp Mining & Smelting Company? A. Yes, I had been so appointed on the 17th." (St. 74)

The purported minutes of the "Informal Gathering" of three of the Trustees of the Board of Seven Trustees of the Twisp Company, that James O. Cull, prepared, which were never approved except by himself, shows that James O. Cull merely acted at that "Informal Gathering" as Secretary Pro Tem in the absence of the regular secretary, Harold Simonds.

The purported minutes that Mr. Cull prepared of a purported special meeting of the Board of Trustees for January 30th, 1934, recites as follows:

> "James O. Cull was elected as Secretary Pro Tem of the meeting and acted."

And further shows that James O. Cull, as "Secretary Pro Tem" moved the Three Trustees at that "Informal Gathering" to appoint himself as the Assistant Secretary, and prepared the resolution that he wanted to have those three trustees pass, which recites:

> "Now Therefore, Be It Resolved, that James O. Cull, of Yakima, Washington, who has heretofore acted, and is now acting, as attorney for the Twisp Mining & Smelting Company, shall be and is hereby appointed as Assistant Secretary of said Company, with full

power and authority to act in all matters pertaining to the Company business * * *."

That being an "Informal Gathering" of some of the Trustees of the Board of Trustees of the Twisp Company without notice to some of the trustees and without their presence no legal resolution could be passed and James O. Cull was not legally appointed as the "Assistant Secretary of the Twisp Company and when he signed that purported certificate for the certified copy of the purported minutes of the "Informal Gathering of Three Trustees" not as an individual, but falsely representing that he was the Assistant Secretary, he forged that instrument under the provisions of Section 2586 of Remington's Revised Statutes of the State of Washington and Mr. Cull further testified:

> "I see Mr. Sawbridge's signature is not on the original", nevertheless a false signature of John Sawbridge is placed on the purported certified copy that James O. Cull admits he prepared.

And James O. Cull, being a "Director", a "Assistant Secretary" and local agent of the Chelan Mining Company, who was acting for the Chelan Mining Company in this purported transaction knew he was never legally appointed as "Assistant Secretary" of the Twisp Company and the Chelan Mining Company was charged with the knowledge of Its agent in the course of his employment as Its agent to wrongfully procure all the assets of the Twisp Company for the Chelan Mining Company.

The Executory Sale Contract Was Never Cancelled

The Alder Group Mining & Smelting Company was the owner of three patented Mining Claims under a Land Patent from the United States of America, which was duly filed for record in the Auditor's Office of Okanogan County, State of Washington on February 16, 1939, and recorded

in Book "M" of Patents on page 97, which Patent was issued on May 13, 1912, and on November 23, 1927, said Alder Group Mining & Smelting Company, in its legal capacity of a "De Facto Corporation" entered into an "Executory Sale Contract" for the sale of those three patented mining claims and that "Executory Sale Contract" together with legal assignments thereof to the Twisp Mining & Smelting Company were duly filed for record with the Auditor of Okanogan County, State of Washington on June 27, 1932, and were duly recorded in Volume 9 of Miscellaneous Records on page 303 as notice to the world of the fact that the Twisp Mining & Smelting Company was the owner of that "Executory Sale Contract" and all the rights and privileges thereunder.

And one of the terms of said "Executory Sale Contract", "Exhibit #4", was:

> "The terms of this agreement shall apply to, be binding upon and inure to the benefit of the successors, grantees, and assigns of the respective parties hereto."

Volume 66 C. J. 1111, section 938m expressly provides:

> "Regardless, however, of the technical distinction made by some courts between constructive notice and implied notice, it is generally held that knowledge of such facts as ought to put a prudent man on inquiry as to the title charges subsequent purchasers with notice not only of those facts which are actually known, but also of all other facts which a reasonable investigation would have ascertained, providing the inquiry becomes a duty, and would lead to the knowledge of the required facts by the exercise of ordinary diligence and understanding." Citing Reynolds v. Mosely, 32 Fed. (2d) (8th C. C. A.) 979, where the court held:

> "The law is well settled that one cannot be deemed an innocent purchaser of an interest in real property, who buys with knowledge of an outstanding title or of out-

> standing rights superior to his own; and knowledge of facts sufficient to put a reasonable prudent man upon inquiry, which if followed up with reasonable diligence, would lead to knowledge of such outstanding title or outstanding rights thereunder."

And *Kosten* v. *Inglis Fleming*, 17 Wash. (2d) 500, 136 P. (2d) 449, holds:

> "A record title would be of small worth if a stranger to, or a one time holder of, the record could defeat it by deed or encumbrance it by lease or mortgage."

Mr. Gillespie, counsel and an officer of the Methow Gold Corporation, in order to falsely attempt to prove that said "Executory Sale Contract" had been cancelled caused Fred B. Morrill, to falsely testify on the trial of this cause, as follows:

> "Mr. R. S. Lewis forwarded me this Contract (Exhibit #4) * * * requested me * * * to cancel the Magney contract, and I instituted proceedings and did cancel it, * * * I brought an action declaring to cancel this contract in the Superior Court of Spokane (County which was) filed August 24, 1932." (St. 250, 251) Exhibit #44, which was admitted in evidence. (St. 256)
>
> Q. At the time you commenced this action, Mr. Morrill, did you ever hear or know that the Twisp Mining & Smelting Company had any interest or claimed to have any interest, or that the contract was ever assigned? A. I may have heard about the Twisp, I wouldn't be sure, but I know very well there was no record of anything of the Twisp or anything to show that they held it. That was not placed of record until a long time after the commencement of this action." (St. 257) "The Court: A long time after what? A. A long time after the commencement of this action." (St. 257)

The "Judge of the State Supreme Court" who wrote the opinion, based his opinion on Mr. Morrill's false testimony,

as stated above, and utterly ignored the proof of the undisputable fact that Mr. Morrill's testimony was false and untrue, as shown from Exhibit #44.

It is admitted then by Fred B. Morrill, on page 18, St. 56, that he brought the action to cancel that "Executory Sale Contract" of date of November 23, 1927, in the Superior Court of Spokane County, State of Washington and the Supreme Court of the State of Washington in *Miles* v. *Chinto Mining Co.*, Vol. 121, No. 24, Wash. Decisions 859, 860 of December 6, 1944, holds under section 204 of Rem. Rev. Stat., subd. 1:

> "That actions for the determination of all question affecting the title * * * to real property shall be commenced in the county in which the subject of the action is situated."

And the Supreme Court in that case held that because the action in the *Miles* case was not filed in the county where the mining property was located there could be no adjudication of anything in that action because the court had no jurisdiction to entertain the purported action and dismissed the action for that reason.

Exhibit #44, shows on its face, that it is alleged in the complaint,

> "That plaintiff, THE ALDER GROUP AND SMELTING COMPANY, is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal office in said State in the City of Spokane, Washington." *BUT NOWHERE AS IN SAID COMPLAINT WAS IT ALLEGED THAT IT HAD PAID ITS ANNUAL LICENSE FEE LAST DUE.* (Italics ours.)

And *National Grocery Co.* v. *Fur Trading Co.*, 3 Wash. (2d) 288, 100 Pac. (2d) 408, holds:

> "That under the provisions of section 3842 of R. R. S. (which was in force prior to 1932 under Remington's

> Compiled Statutes). No corporation shall be permitted to commence or maintain any suit, action or proceedings in any court of this state, without alleging and proving it has paid its annual license fee last due."

And *Paterson* v. *Ford,* 167 Wash. 121, 8 Pac. (2d) 1006, holds that no judgment can lawfully be rendered against a person or corporation unless that person or corporation is made a party to the action, which was not done in that case, and the Twisp Mining & Smelting Company not being made a party to that action the court held in the *Patterson* case above, as follows:

> "Appellant not being a party to the action, and not being brought in as such, * * *, the trial court had no such jurisdiction of it as to warrant the re-dition of any judgment or the making of any order divesting it or its record title to the real estate."

And by virtue of that holding, the said "Executory Sale Contract" of date of November 23, 1927, was never cancelled as a matter of law, and the "Writer" of the State Supreme Court manifestly failed to even examine the said Exhibit #44, and protect the Twisp Company's rights in the premises.

Mr. Gillespie further examined Mr. Morrill and caused him to testify as follows:

> "Mr. Robert S. Lewis notified me (Mr. Morrill), that he and I were the only surviving trustees on or after June, 1938 and the new corporation had not been perfected; and the old corporation still stood. Then as I remember Mr. McCain and you (Gillespie), Mr. McCain had talked with me about this property before that time and knew about it, and I got hold of Mr. McCain and you, and you made a proposition to buy this property on bond and lease for $300,000.00 and that was drawn up and sent to Mr. Lewis and was not accepted but it terminated in this lease that you have now. * * *. Mr. Strong came there and you and

Mr. McCain and Mr. Strong had a meeting there in my office. (St. 260-261)

Mr. Gillispie: "Q. And the result of that was that they would transfer to you and to Robert S. Lewis—by "they" I mean the Chelan Mining Company—would transfer that to you (Fred B. Morrill and Robert S. Lewis) and you would issue the other? A. It worked out to be this lease that is in question—not a bond and lease, but a lease." (St. 261)

Joint Illegal Acts of the Chelan Mining Company, the Methow Gold Corporation and Robert S. Lewis and Fred B. Morrill, as Surviving Trustees to Engage in New Business in Behalf of the Alder Group Mining & Smelting Company to Attempt to Illegally Defeat the Executory Sale Contract Exhibit No. 4, Herein.

In *Bishop* v. *Averill*, 17 Wash. 209, 49 Pac. 1024, that practice was tried and the court in passing on the validity of such practice held:

> "The provisions by which time was made the essence (Of The Executory Sale Contract) were made for the benefit of the respondent (Vendor) and the right to enforce the contract belonged to the respondent (Vendor), but the evidence tended to show that during the lifetime of the contract, * * *, the respondent voluntarily entered into a new agreement, under which in disregard, as we think—of appellant's rights, the property was actually transferred to Kerr, and the old contract terminated. This termination resulted, not in consequent of the expiration of any of the provisions in it, but solely because of the new contract, which was made without appellant's consent."

In this instance, the Twisp Company was not in default, but the Chelan Mining Company, by Its President, Mr. Strong, and the Two Surviving Trustees, Robert S. Lewis and Fred B. Morrill, and the Methow Gold Corporation, by its counsel and officer unlawfully and illegally entered into

a contract on behalf of the Alder Group Mining & Smelting Company to engage in new business in behalf of the Alder Group Mining & Smelting Company, which they had no legal right to do, that contract was dated January 23, 1939, and consisted of a contract for a lease, as evidenced by Exhibit #11 & Exhibit #12, and the Methow Gold Corporation obtained an assignment of said purported lease from Charles W. Gillespie and Mahlon McCain the original lessees and the Methow Gold Corporation unlawfully took possession of the lands described in said lease and prevented the Twisp Company from fulfilling the terms of the "Executory Sale Contract" Exhibit #4.

The "Receiver" under oath admitted that the two surviving trustees, Robert S. Lewis and Fred B. Morrill, entered into an agreement of January 23, 1939, Exhibit #11, herein and pursuant to that agreement the Chelan Mining Company executed and delivered to said surviving trustees a conveyance of the real property described in the "Amended Complaint of the Twisp Company on January 17, 1939"; and further admits that the consideration for said contract and conveyance was furnished out of the proceeds derived by the Methow Gold Corporation from the sale of ore removed from the three patented mining claims mentioned and described in the "Executory Sale Contract" of date of November 23, 1927, Exhibit No. 4, herein (Tr. 42).

On account of the illegal acts of the Two Surviving Trustees, Robert S. Lewis and Fred B. Morrill, in attempting to engage in new business, W. E. Gamble, one of the stockholders of the Alder Group Mining & Smelting Company, started an action in the Superior Court of Spokane County, State of Washington, entitled *W. E. Gamble* v. *Alder Group Mining & Smelting Company* and Robert S. Lewis and Fred B. Morrill, surviving trustees, case No. 102961, of the Files and records of that action on February 3, 1939, seeking to have a statutory liquidating receiver appointed under

the statutory proceedings of Section 3803-53 of Remington's Revised Statutes (Sup.) of the Uniform Business Corporation Act of 1933, which went into full force and effect on January 1, 1934, and said Surviving Trustees appeared on behalf of the corporation and themselves and contested the appointment of the Statutory Liquidating Receiver on the grounds that they had entered into a 99-year lease of the property and the court held that said transaction covered by Exhibit #11 and Exhibit #12 of date of January 23, 1939, were absolutely null and void and entered an order on May 18, 1939, appointing the present Receiver, as a statutory liquidating Receiver of the Alder Group Mining & Smelting Company and a certified copy of those proceedings was introduced in evidence on the trial of this cause in the Superior Court of Okanogan County, State of Washington, under Exhibit #57.

Thereafter, Fred B. Morrill, filed a claim with the Receiver, for attorney fees for his services in procuring the Contract Exhibit #11 and Lease Exhibit #12, and the trial court denied his claim and on appeal to the Supreme Court in *Gamble* v. *Alder Group Mining & Smelting Company, Fred B. Morrill and Robert S. Lewis, defendants; Fred B. Morrill, Appellant* v. *Seattle-First National Bank, Spokane & Eastern Division, as Receiver, Respondent*, 5 Wash. (2d) 578, 105 Pac. (2d) 811, the court held:

> "From that portion of the order disallowing the claim for services rendered prior to the institution of the receivership action, this appeal is taken. * * *. In addition to making the lease above mentioned, the surviving directors had other transactions. *They, at no time prior to the beginning of the receivership action, attempted to wind up the affairs of the corporation or call any meeting of the stockholders.* * * * From the order appointing the receiver, no appeal was taken, and that order became final. * * *. The corporation being in the condition it was, unless authorized by

statute, of which we know of none in this state, had no power to transact new business. (Citing Authorities) Since it was the duty of the appellant and his associate director to refrain from engaging in new business, it would seem evident that the appellant (Mr. Morrill) would not be entitled to compensation for doing something which under the law, it was his duty not to do."

The Receiver Never Functioned as a Legal Receiver

23 R. C. L. 70 and 71, expressly provides:

"He should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should as far as possible, see to it that each has an equal opportunity to enforce his claim.

23 R. C. L. 74 and 75, further provides:

"There is a distinction between the power of a receiver to elect not to bind the receivership by existing executory contracts and his power to annul such contracts. He had no power to do any act which will impair the obligation of a binding contract so far as the parties are concerned."

In *Wapes* v. *Sergeant*, 120 Wash. 63, 206 Pac. 945, the court held:

"Facts briefly were: Sergeant held an executory sale contract for the purchase of standing timber and that executory sale contract was still in force, but for some reason there was a receiver appointed to take over the property and property rights of the 'Vendee' in said executory sale contract. The Court held: 'When the corporation was formed Sergeant undertook to assign to it this contract, and it (corporation) obtained just such rights in this property as the corporation had. If Sergeant was the owner of this contract, he would have the right until such times as a forfeiture had been

> properly declared, to cut the timber, saw it into lumber, sell it and pay $3.00 per thousand feet from the sale price to these appellants, until the whole of the balance had been paid. In our opinion, the receiver is not the unqualified owner of this property, and had no right to undertake to sell and convey an unencumbered, unconditional title to it."

In *Kennison* v. *Kanzler* (6th C. C. A.) 4 Fed. (2d) 315, the court held:

> "A receiver takes the property which goes into his hands in the same right and equities, and liens, as it stood in the hands of the person or corporation out of whose possession it is taken."

The "Present Receiver" ignored the undisputable fact, that the Twisp Company was the lawful owner of the "Executory Sale Contract"—Exhibit #4, as vendee, subject only to the payment of the purchase price, and had an absolute right to mine the ore on the premises, sell same and apply same on the purchase price until the full amount of the payments due on same had been paid.

In *Payne* v. *Ryan*, 183 Wash. 590, 49 Pac. (2d) 53, 56, holds:

> "The evidence shows that appellant, after the principal contract had been let, pursued a course of evasion with Williams, the manager for the respondent, urging to "forget about the written contract, and financial showing and be ready to get to work," negotiated with other contractors for lower prices for truck work and finally repudiated the contract with respondent. Hence, it was he who breached the oral contract, which had been entered into between the parties. * * * "It was appellant himself, who prevented performance of the conditions precedent by the respondent," and this court on appeal held: "The rule is clear and well settled, and founded in absolute justice, that no party

> can either prevent performance by another of any of its conditions, or, on the other hand disable himself from complying with any conditions, and derive any benefits or escape any liabilities."

And this "Statutory Liquidating Receiver" instead of doing its duty as by law prescribed, it never functioned as a "liquidating Receiver", but on the contrary at all times functioned as an usurper of power which it did not have as a matter of law. It illegally caused the Trial Court in the receivership action to exceed the statutory power and to pretend illegally to enter into an illegal contract with the Methow Gold Corporation on July 27, 1939, to commit willful trespass on the rights of the Twisp Company to mine the ore, sell same and make its payments on the "Executory Sale Contract" Exhibit #4, herein and by reason of that willful trespass there was more than $400,000.00 worth of mineral sold from said premises and confiscated by the Methow Gold Corporation with the exception of some $25,000.00, that the Receiver obtained from that illegal transaction and the stockholders of the Alder Group Mining & Smelting Company have been defrauded out of their contract price of the Executed Sale Contract of the sum approximated of some $300,000.00, and the Receiver's actions in this instant case is governed by the ruling in *Pittsburg & West Virginia Gas Co.* v. *Prentress Gas Co.* (W. Va.), 100 S. E. 296 7 A. L. R. 901.

This Court in *John Vallely, as Trustee* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 65 Law Ed. 297, holds:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void and that even prior to reversal."

And in *Ranson* v. *Williams,* 2 Wall. 313, 17 Law Ed. 803, this Court held:

> "The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by Courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a court of general jurisdiction, because no authority derived by law can transcend the source from whence it came, and the principle that a limited authority must appear to have been strictly construed even when the acts of a Superior Court are in question is well settled." Also see Murry v. American Surety Co., 70 Fed. (9th C. C. A.) 341.

This motion therefore presents a case to this Honorable United States Supreme Court in which the undisputable evidence that reveals a deliberately planned and carefully executed scheme on the part of the Chelan Mining Company, Receiver and the Methow Gold Corporation and their officers to obstruct the due administration of the law to the Twisp Mining & Smelting Company and to illegally and deliberately obtain the approval of the Courts to their illegal confiscation of the property and property rights of the Twisp Mining & Smelting Company without any legal authorization or the payment of any real consideration therefor and we submit that it is therefore the duty of this Court to take jurisdiction of this case under the historic power of equity to relieve the Twisp Mining & Smelting Company from their fraudulently begotten judgments, that is to say, that it is the duty of this Court to vacate the order of the State Supreme Court that was entered on July 21, 1944, and direct the State Supreme Court to grant the Twisp Mining and Smelting Company permission to file its petition in the Superior Court of Okanogan County, State

of Washington for relief from the said fraudulently begotten judgment because this matter does not only concern the Twisp Mining & Smelting Company, but it concerns every corporation in States where the Uniform Business Corporation Act is in force and unless this fraudulently begotten judgment is vacated and held for naught it will establish a precedent that will be hard to overcome, if possible to be done, and there cannot be any equities intervened to anyone, because the Chelan Mining Company took with notice and the Receiver cannot claim any and the Methow Gold Corporation did not file the lease (Exhibit #12) or the assignment of same (Exhibit #15) until March 8, 1939, and the lis pendens was filed on February 23, 1939 (St. 138, 139), (St. 157)

Appellant therefore respectfully submits that in the event that this Supreme Court of the United States takes the position that the Chief Justice of the State Supreme Court improvidently allowed the appeal, that the Supreme Court of the United States should grant appellant a review of this cause on a writ of certiorari pursuant to the provisions of Section 237 (c) of the Judicial Code of the United States and grant the appellant the relief prayed for in accordance with the law of the land.

LUCIUS G. NASH,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY,
A Corporation,

Appellant,

vs.

CHELAN MINING COMPANY, A Corporation; SEATTLE-FIRST NATIONAL BANK, Acting Through Its SPOKANE & EASTERN BRANCH, as Receiver of the Alder Group Mining & Smelting Company, a Defunct Corporation; and METHOW GOLD CORPORATION, A Corporation,

Appellees.

APPELLANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A WRIT OF CERTIORARI

Lucius G. Nash,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 866

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE-FIRST NATIONAL BANK, ACTING THROUGH ITS SPOKANE & EASTERN BRANCH, AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Appellees.

MOTION

Comes now the Appellant, Twisp Mining & Smelting Company, out of abundance of caution, under the provisions of Section 237 (c) of the Judicial Code of the United States and moves this Honorable Court in the event that this Honorable Court takes the position that the appellant's appeal was improvidently allowed by the Chief Justice of the State Supreme Court on November 20, 1944, to treat the papers whereon the appeal was allowed by the State Supreme Court as a petition for certiorari and as if presented to this Court at the time they were presented to the

judge who allowed the appeal on the grounds and for the following reasons, to-wit:

The Foregoing Motion is based on the grounds that the Judgment and Decree of the Superior Court of Okanogan County, State of Washington and the affirmance thereof by the State Supreme Court was the result of a deliberately planned and carefully executed scheme to defaud the Trial Court and the State Supreme Court by the knowing use of perjured testimony and fraudulent representations to fraudulently obstruct and defeat the due administration of justice in the manner indisputably shown in the Motion herein which involves far more than an injury to a single litigant, for it was the perpetration of a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated with the good of society.

Section 237(c) of Judicial Code of the United States provides:

> "If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted upon as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed."

In *Longest* v. *Lanford*, 274 U. S. 499, 71 Law Ed. 1170, this Court stated the law governing the above statute, as follows:

> "The writ obviously was improvidently allowed. This case falls within the class where a review in this Court may be had only on petition for certiorari under section 237 (b) of the Judicial Code. The distinction is important, has a real purpose and should be given effect by all who are invested with authority to allow writs of

error running from this court to a state court. A failure to observe it may subject the party suing out the writ to damages and double costs (Rev. Stat. Sec. 1010; Judicial Code, Sec. 237 (c); U. S. Code, Title w8, section 344) and result in harm embarrassmenr to the other party. Of course where the writ is improvidently allowed the other party may move in this court to dismiss it. But in actual practice this does not operate as an adequate corrective, for the action of the judge in allowing the writ usually is assumed to be advisely taken. In the present case the fact that the allowance was improvidently escaped the notice of the parties for a full year. While we cannot take jurisdiction on the writ of error so improvidently allowed, we can, under section 237 (c) of the Judicial Code, treat the papers whereon the writ was allowed as a petition for certiorari and as if presented to this Court at the time they were presented to the judge who allowed the writ. The papers have been examined under that section; and we are of the opinion that, treating them as a petition for certiorari, they disclose a case and situation in which the petition should be granted. Writ of error as such dismissed, but as petition for certiorari granted."

This Court on similiar cases in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions 936, and *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 88 U. S. Law Ed. Advance Opinions, 954, granted reviews on Writs of Certiorari and it would seem that this Court should grant the present motion in the event that the Court deems the appeal was improvidently allowed and protect and safeguard the public from a repetition of such actions that are disclosed in this instant case for these appellees are faced with the rule of law their acts cannot be tolerated consistently with the good order of society.

In *Roach* v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, there was a judgment entered in the Superior Court of Spokane County, State of Washington in favor of Mr. Roach, and the

laws of the State of Washington, under Sections 459 and 460, provided that such judgment could not be collected unless the collection was completed within six years from the date of the judgment; Mr. Roach, however, brought an action on said Judgment in the State of Oregon, and obtained another judgment against McDonald and then came back to Washington and sought to obtain another judgment against McDonald by virtue of the Oregon Judgment and the Washington Court denied Roach any judgment and the State Supreme Court construed sections 459 and 460 of the Washington statutes to provide that Roach could not be granted full faith and credit on his Oregon Judgment and the case was appealed to this Court and this Court denied the Appeal held:

> "This writ of error (or appeal) is dismissed for want of jurisdiction, but since the papers show adequate reason for invoking a review by a petition for writ of certiorari and that will be granted." The U. S. Supreme Court reversed the State Supreme Court in this case.

Appellant respectfully submits that in the event that this Supreme Court of the United States takes the position that the Chief Justice of the State Supreme Court improvidently allowed the appeal, that the Supreme Court of the United States should grant appellant a review of this cause on a writ of certiorari pursuant to the provisions of Section 237 (c) of the Judicial Code of the United States and grant the appellant the relief prayed for in accordance with the law of the land.

LUCIUS G. NASH,
Attorney for Appellant.